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# Personhood Amendments After *Whole Woman's Health v. Hellerstedt*

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PERSONHOOD AMENDMENTS AFTER  
*WHOLE WOMAN'S HEALTH V.*  
*HELLERSTEDT*

*Steven R. Morrison*<sup>†</sup>

ABSTRACT

Over the past six years, pro-life advocates have used Targeted Regulation of Abortion Provider (TRAP) laws and state-level constitutional personhood amendments to end abortion. The United States Supreme Court's recent opinion in *Whole Woman's Health v. Hellerstedt* suggests that the TRAP strategy will give way to a greater push for personhood amendments. This is so for three reasons. First, *Whole Woman's Health* undermined the woman's-health basis for TRAP laws and may encourage advocates to refocus their efforts on fetal rights. Second, *Whole Woman's Health* limited the types of statutes that can survive judicial scrutiny, but left constitutional amendments untouched. Third, with TRAP laws under attack, the pro-life movement's only other sustained, institutional strategy is to push personhood amendments.

*Whole Woman's Health* also reinforced the *Planned Parenthood of Southeastern Pennsylvania v. Casey* undue burden test. The law around abortion rights, therefore, has become less favorable to pro-life advocates. The fight over reproductive rights will thus become more overtly political. Because personhood amendments are broad and vague enough not to be facially unconstitutional, and because they engage voters' social and moral preferences, they represent the political future of the pro-life movement. Advocates would, therefore, do well to concentrate on the political aspects of personhood amendments.

This Article illuminates those political aspects by analyzing the 2014 campaign against North Dakota's personhood amendment, which is broadly representative of past—and probably future—campaigns from three vantage points. Historically, it places North Dakota's campaign in the context of the post-*Roe v. Wade* fight over abortion rights and the probable effect of *Whole Woman's Health*. Legally, this Article analyzes the salient legal issues arising from the amendment and its possible impacts, most importantly on reproductive rights, end-of-life

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care, and in vitro fertilization. Politically, the Article reports the results of a survey the author performed, which details why the North Dakota amendment failed so decisively at the ballot box. *Whole Woman's Health* may signal a new era for reproductive rights; it will certainly mean that personhood amendments become more attractive to pro-life advocates. This Article provides the insight necessary to understand that shift.

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## INTRODUCTION

There have been demonstrable legal successes against the right to obtain an abortion,<sup>1</sup> especially since around 2010 with the onslaught of Targeted Regulation of Abortion Provider (TRAP) laws, which had been introduced sporadically since the 1980s.<sup>2</sup> In 2016, however, the United States Supreme Court in *Whole Woman's Health v. Hellerstedt*<sup>3</sup> issued a broadside against these laws, requiring not only that they

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1. The cause of reproductive rights has been referred to as one of low political priority, Kimberly A. Johns, *Reproductive Rights of Women: Construction and Reality in International and United States Law*, 5 CARDOZO WOMEN'S L.J. 1, 2 (1998), one that experienced setback, Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform*, 15 CUNY L. REV. 391, 396 (2012), and one that is under assault, Dawn Johnsen, *State Court Protection of Reproductive Rights: The Past, the Perils, and the Promise*, 29 COLUM. J. GENDER & L. 41, 43 (2015), and attack. Sajeda Amin & Sara Hossain, *Religious & Cultural Rights: Women's Reproductive Rights and the Politics of Fundamentalism: A View from Bangladesh*, 44 AM. U. L. REV. 1319, 1340 (1995).

Since the beginning of 2011, at least 288 state anti-abortion laws have been passed, a trend that accelerated in 2015. Editorial, *The Reproductive Rights Rollback of 2015*, N.Y. TIMES (Dec. 19, 2015), <https://www.nytimes.com/2015/12/20/opinion/sunday/the-reproductive-rights-rollback-of-2015.html> [<https://perma.cc/E3EG-D9DN>]. In the same year, Planned Parenthood, whose 2013 budget included only three percent for abortion services and ninety-six percent for cancer screening, STD testing and treatment, contraceptive provisioning, and other women's health services, PLANNED PARENTHOOD, 2013–2014 ANNUAL REPORT: OUR HEALTH. OUR DECISIONS. OUR MOMENT. 17 (2014), [https://www.plannedparenthood.org/files/6714/1996/2641/2013-2014\\_Annual\\_Report\\_FINAL\\_WEB\\_VERSION.pdf](https://www.plannedparenthood.org/files/6714/1996/2641/2013-2014_Annual_Report_FINAL_WEB_VERSION.pdf) [<https://perma.cc/8ZTA-GZQ9>], was the target of a libelous plan by now-criminal defendants, Manny Fernandez, *2 Abortion Foes Behind Planned Parenthood Videos Are Indicted*, N.Y. TIMES (Jan. 25, 2016), <https://www.nytimes.com/2016/01/26/us/2-abortion-foes-behind-planned-parenthood-videos-are-indicted.html> [<https://perma.cc/ZSA2-5YSR>], to defund it, based on doctored videos that showed no malfeasance. Irin Carmon, *Texas Defunds Planned Parenthood; Louisiana Doesn't (Yet)*, MSNBC (Oct. 19, 2015), <https://www.msnbc.com/msnbc/texas-defunds-planned-parenthood-louisiana-doesnt-yet> [<https://perma.cc/5C3T-57BN>].

2. The Guttmacher Institute reported that between 2010 and 2015, 282 TRAP statutes and other abortion regulations had been enacted, with fifty-one in the first half of 2015 alone. *Laws Affecting Reproductive Health and Rights: State Trends at Midyear, 2015*, GUTTMACHER INSTITUTE (July 1, 2015), <http://www.guttmacher.org/media/inthenews/2015/07/01/index.html> [<https://perma.cc/GDB6-JTS2>]. The New York Times reported similar numbers and noted that in 2015, “[h]undreds more [TRAP laws] were considered.” *The Reproductive Rights Rollback of 2015*, *supra* note 1.
3. 136 S. Ct. 2292 (2016).

present no undue burden to obtaining an abortion, but also that they actually serve the pregnant woman's health.<sup>4</sup> While *Whole Woman's Health* left in place the undue burden test established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>5</sup> it put a stake through the heart of one of the pro-life movement's two main legal strategies.

The other strategy entails pushing state-level constitutional personhood amendments.<sup>6</sup> These amendments have in fact been called the wave of the pro-life future<sup>7</sup> and are viewed as mechanisms useful in overturning *Roe v. Wade*<sup>8</sup> and *Casey*.<sup>9</sup> As *Whole Woman's Health* decimated the legal viability of TRAP laws, pro-life advocates will likely shift their resources to enacting personhood amendments.

In addition to the fact that personhood amendments are the pro-life movement's second strategy after TRAP laws, Professor Mary Ziegler identified two reasons to believe that the movement will increasingly push these amendments.<sup>10</sup> First, *Whole Woman's Health* undermined the movement's focus on the purported health of the pregnant woman, requiring the movement to reassess this tactic.<sup>11</sup> Some have suggested "that it is time to refocus on fetal rights,"<sup>12</sup> which is what personhood amendments are all about. Second, with *Whole Woman's Health* calling into question the validity of anti-abortion statutes, there may be a renewed push to amend constitutions, whether

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4. *Id.* at 2309.

5. 505 U.S. 833, 874 (1992).

6. Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, 74 OHIO ST. L.J. 75, 77 (2013); T.J. Scott, *Why State Personhood Amendments Should Be Part of the Prolife Agenda*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 222, 225 (2011).

7. Mark Strasser, *The Next Battleground? Personhood, Privacy, and Assisted Reproductive Technologies*, 65 OKLA. L. REV. 177, 177 (2013).

8. 410 U.S. 113 (1973).

9. Mandi D. Campbell, *Reviving a Culture of Life in America*, 6 LIBERTY U. L. REV. 283, 296 (2012).

10. See Mary Ziegler, *Where the Pro-Life Movement Goes Next*, N.Y. TIMES (July 2, 2016), <https://www.nytimes.com/2016/07/03/opinion/sunday/where-the-pro-life-movement-goes-next.html> [https://perma.cc/8NEA-D3GG] (likening the impact of *Whole Woman's Health* on the pro-life movement to that of *Roe* and discussing the movement's way forward).

11. *Id.*

12. *Id.*

federal or state.<sup>13</sup> Personhood amendments have been touted as the very amendments that can undermine the Court's reasoning in *Roe*.

The law around abortion rights, therefore, has become less favorable to pro-life advocates. The fight over reproductive rights will thus become more overtly political. Because personhood amendments are broad and vague enough not to be facially unconstitutional, and because they engage voters' social and moral preferences, they represent the political future of the pro-life movement, and efforts to enact them persist.<sup>14</sup> Advocates would, therefore, do well to concentrate on the political aspects of personhood amendments.

Grassroots campaigns for and against abortion rights have been doing this for a long time.<sup>15</sup> Legal scholars, however, have generally not taken a political approach to personhood amendments. Instead, they discuss the philosophical notion of personhood,<sup>16</sup> the legal use of personhood amendments as a wedge to undermine *Roe*,<sup>17</sup> and the unintended consequences of personhood amendments.<sup>18</sup> As one exception, law

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13. See *id.* (describing the pro-life movement's post *Roe* strategy of focusing on amending the Constitution, and its potential new focus on state legislature races).
  14. Johnsen, *supra* note 1, at 69–70; *Personhood Bills and Ballot Initiatives*, RESOLVE, <http://www.resolve.org/get-involved/the-center-for-infertility-justice/personhood-legislation/> [<https://perma.cc/7YPT-LGWQ>] (last visited Oct. 7, 2016).
  15. Most recently, in the wake of Indiana Governor Mike Pence's signing of anti-abortion legislation, the "Periods for Pence" campaign began, in which women invite the Governor to their gynecologist appointments and tweet to him when they change their tampon. Mitch Smith, "Periods for Pence" Campaign Targets Indiana Governor over Abortion Law, N.Y. TIMES (Apr. 7, 2016), <http://www.nytimes.com/2016/04/08/us/periods-for-pence-campaign-targets-indiana-governor-over-abortion-law.html> [<https://perma.cc/T7XQ-RN84>].
  16. Brendan (Bo) F. Pons, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go from Here?*, 58 S.D. L. REV. 119, 138–52 (2013) (outlining various historical and contemporary approaches in philosophy to natural, artificial, and potential personhood and evaluating their applicability to the unborn).
  17. See Scott, *supra* note 6, at 230 ("[B]y passing state constitutional amendments that define the word 'person' as including the unborn, the Supreme Court will eventually be forced to review its holding in *Roe*."); Jonathan F. Will, *Membership Has Its Privileges? Life, Personhood, and Potential in Discussions About Reproductive Choice*, 43 J.L. MED. & ETHICS 358, 358–60 (2015) (arguing that introducing "personhood" into the discussion of abortion would clarify the meaning of Justice Blackmun's statement in *Roe* that "we need not resolve the difficult question of when life begins" and lead to a legal right to life for prenatal humans).
  18. See Strasser, *supra* note 7 (discussing the potential impact of prenatal personhood on abortion, contraception, and in vitro fertilization); Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates*

professor Maya Manian has offered a political opinion for why voters uniformly reject personhood amendments.<sup>19</sup>

This Article addresses the gap in scholarship on personhood amendments by analyzing the successful fight against the 2014 personhood amendment—known as “Measure 1”—that was on the North Dakota ballot. It does so in three ways.

Historically, this Article places Measure 1 in the context of the post-*Roe* fight over the abortion right, and analyzes the probable effect of *Whole Woman's Health* on the personhood movement. Legally, the Article analyzes the salient legal issues arising from the amendment and its possible impacts, most importantly on reproductive rights, end-of-life care, and in vitro fertilization (“IVF”). Politically, this Article reports the results of a survey I performed of the most active members of the campaign against Measure 1, called North Dakotans Against Measure 1, or “NDAM1.”<sup>20</sup>

This three-part analysis will help scholars understand the role that personhood amendments have played and will play in the broader fight over reproductive rights. It also provides a detailed snapshot of a movement that began with *Roe*, may have been fundamentally altered by *Whole Woman's Health*, and will continue well into the future. This Article will also help advocates in future personhood campaigns advance their cause. For anti-amendment advocates, this Article provides a roadmap to victory. For pro-amendment advocates, it offers a sobering analysis of the hurdles that they must overcome.

This Article is applicable nationwide for four reasons.

First, Measure 1 “signals a new approach for the groups championing personhood measures, one that critics say hides the initiatives’ true goals from voters.”<sup>21</sup> Measure 1 may be a harbinger of campaigns to come.

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*Reproductive Choice*, 39 AM. J.L. & MED. 573 (2013) (discussing the potential impact of personhood amendments on contraception and in vitro fertilization).

19. See Manian, *supra* note 6 (suggesting that the recognition of the implications of personhood amendments beyond abortion may have persuaded even those voters opposed to abortion to reject personhood legislation).
20. Experts on empirical studies will detect some potential problems with surveying only this population. In Part III, I address the limitations that compelled me to select this group and the major anticipated critiques of the survey.
21. Tierney Sneed, ‘Personhood’ Amendments Shake Up Elections in North Dakota, Colorado, U.S. NEWS & WORLD REP. (Oct. 29, 2014, 6:00 AM), <https://www.usnews.com/news/articles/2014/10/29/personhood-amendments-shake-up-elections-in-north-dakota-colorado> [<https://perma.cc/7NCL-QUJ9>]; see also Nina Martin, *As Vote Nears, North Dakota Amendment Stirs Debate About More than Abortion*, PROPUBLICA (Oct. 31, 2014, 11:40 AM), <https://www.propublica.org/article/as-vote-nears>

Second, it seems that these amendments will not change substantively. Like Measure 1, all the personhood amendments in Mississippi and Colorado—where personhood amendments have been advanced in the past—entailed a broad definition of personhood that would have covered the unborn as well as anyone living.<sup>22</sup> Proponents of personhood

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north-dakota-amendment-stirs-debate-about-more-than-abortion [https://perma.cc/S962-XHWG] (“The battle over Measure 1 highlights the biggest trend in national abortion politics this November: wide-ranging pro-life ballot initiatives that would alter state constitutions in ways whose long-term repercussions are difficult to predict.”); Robin Marty, *A Personhood Amendment by Any Other Name . . . Would Still Ban Abortion*, THE GUARDIAN (Oct. 15, 2014, 7:15 AM), <https://www.theguardian.com/commentisfree/2014/oct/15/personhood-amendment-ban-abortion-north-dakota-colorado> [https://perma.cc/LC45-MV59] (“[Measure 1] is vague and its supporters are uninterested in either calling it a personhood amendment or elucidating what it will do to voters (especially since, if passed, it could shut down the state’s only in vitro fertilization treatment center).”).

22. The state, voting year, and language of these ballot initiatives and amendments were:

Colorado, 2008: “Shall there be an amendment to the Colorado constitution defining the term ‘person’ to include any human being from the moment of fertilization as ‘person’ is used in those provisions of the Colorado constitution relating to inalienable rights, equality of justice, and due process of law?” *Colorado Definition of Person, Initiative 48 (2008)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado\\_Definition\\_of\\_Person,\\_Initiative\\_48\\_\(2008\)](https://ballotpedia.org/Colorado_Definition_of_Person,_Initiative_48_(2008)) [https://perma.cc/49KD-UVF8] (last visited Oct. 7, 2016).

Colorado, 2010: “Section 32. Person defined. As used in sections 3, 6, and 25 of Article II of the state constitution, the term ‘person’ shall apply to every human being from the beginning of the biological development of that human being.” *Colorado Fetal Personhood, Initiative 62 (2010)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado\\_Fetal\\_Personhood,\\_Initiative\\_62\\_\(2010\)](https://ballotpedia.org/Colorado_Fetal_Personhood,_Initiative_62_(2010)) [https://perma.cc/L2LR-6GEV] (last visited Oct. 7, 2016).

Mississippi, 2011: “SECTION 33. Person defined. As used in this Article III of the state constitution, The term ‘person’ or ‘persons’ shall include every human being from the moment of fertilization, cloning or the functional equivalent thereof.” *Mississippi Life Begins at the Moment of Fertilization Amendment, Initiative 26 (2011)*, BALLOTPEDIA, [https://ballotpedia.org/Mississippi\\_Life\\_Begins\\_at\\_the\\_Moment\\_of\\_Fertilization\\_Amendment,\\_Initiative\\_26\\_\(2011\)](https://ballotpedia.org/Mississippi_Life_Begins_at_the_Moment_of_Fertilization_Amendment,_Initiative_26_(2011)) [https://perma.cc/V6CR-32BY] (last visited Oct. 7, 2016).

Colorado, 2014: “2. Definitions. In the interest of the protection of pregnant mothers and their unborn children from criminal offenses and neglect and wrongful acts, the words ‘person’ and ‘child’ in the Colorado Criminal Code and the Colorado Wrongful Death Act must include unborn human beings.” *Colorado Definition of “Personhood” Initiative, Amendment 67 (2014)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado\\_Definition\\_of\\_%22Personhood%22\\_Initiative,\\_Amendment\\_67\\_\(2014\)](https://ballotpedia.org/Colorado_Definition_of_%22Personhood%22_Initiative,_Amendment_67_(2014)) [https://perma.cc/RE8A-ZU7T] (last visited Oct. 7, 2016).



seem to favor this broad application because it would supposedly prohibit not only abortion, but also IVF<sup>23</sup> and stem cell research,<sup>24</sup> both of which some pro-life advocates oppose.<sup>25</sup> Personhood supporters may even support personhood amendments as a mechanism for prohibiting living wills and other end-of-life care.<sup>26</sup> Personhood amendments may,

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- An amendment was slated to appear, but did not appear, on the Mississippi ballot in 2015, which would have read, "Section 269A. The right to life begins at conception. All human beings at every stage of development are unique, created in the image of God, and shall enjoy the inalienable right to life as persons under the law." *Mississippi "Personhood" Amendment (2015)*, BALLOTPEDIA, [https://ballotpedia.org/Mississippi\\_%22Personhood%22\\_Amendment\\_\(2015\)](https://ballotpedia.org/Mississippi_%22Personhood%22_Amendment_(2015)) [<https://perma.cc/VVN7-BLCH>] (last visited Oct. 7, 2016); Letter from Ann Reed to Delbert Hoseman, Miss. Office of the Sec'y of State (Mar. 5, 2013), [http://www.sos.ms.gov/Initiatives/Initiative%2041%20Original%20Filing\\_A%20Reed.pdf](http://www.sos.ms.gov/Initiatives/Initiative%2041%20Original%20Filing_A%20Reed.pdf) [<https://perma.cc/EH3H-NFNB>].
23. Cf. Stephen M. Crampton, *An Apologia for Personhood*, 6 LIBERTY U. L. REV. 299, 300–01 (2012) ("More recently, those involved in the in vitro fertilization and cloning industries have devised new terminology to deny the humanity and Personhood of unborn children. Rather than refer to unborn children as 'embryos,' these wordsmiths have dubbed them 'pre-embryos.' Their intent, of course, is to imply that destruction of these living beings is morally acceptable because they are pre-human. Although the term has been discredited by the Nomenclature Committee of the American Association of Anatomists, its use continues." (citations omitted)).
24. Madeline E. Guillot, *Playing God: Why the Thirteenth Amendment Protects Human Embryos from Stem Cell Research*, 14 LOY. J. PUB. INT. L. 171, 175, 202 (2012) ("[T]he Thirteenth Amendment [of the United States Constitution] protects human embryos from involuntary servitude, and the donation of human embryos to the National Institute [sic] of Health for stem cell research violates the Thirteenth Amendment. . . . [Therefore,] [t]he United States Congress should recognize the humanity of IVF embryos and grant them the respect and dignity they deserve as human life.").
25. Brian Clowes, *Confused About Stem Cell Research? A Pro-Life Primer*, LIFE NEWS.COM (May 20, 2013, 5:09 PM), <https://www.lifenews.com/2013/05/20/confused-about-stem-cell-research-a-pro-life-primer/> [<https://perma.cc/MY5U-C5QS>]; Will Honeycutt, *Is IVF an Ethical Choice for Pro-Life Parents?*, CROSSWALK.COM (Nov. 14, 2014), <http://www.crosswalk.com/family/parenting/kids/is-ivf-an-ethical-choice-for-pro-life-parents.html> [<https://perma.cc/H7X3-SJSJ>]; *In Vitro Fertilization: Frequently Asked Questions & Answers*, MASS. CITIZENS FOR LIFE, <http://www.masscitizensforlife.org/in-vitro-fertilization-pro-life-faq/> [<https://perma.cc/E45V-C7TK>] (last visited Oct. 7, 2016); *In Vitro Fertilization*, STUDENTS FOR LIFE OF AMERICA, <http://studentsforlife.org/invitrofertilization/> [<https://perma.cc/7ZAC-B5AD>] (last visited Oct. 7, 2016); Melanie Hunter, *Pro-Life Groups Protest Embryonic Stem Cell Research*, CNS NEWS.COM (July 7, 2008, 8:19 PM), <http://cnsnews.com/news/article/pro-life-groups-protest-embryonic-stem-cell-research> [<https://perma.cc/6NYT-PR9N>].
26. During legislative debate on Measure 1, one North Dakota senator was asked whether Measure 1 could prohibit living wills concerning "unnatural forms

furthermore, be part of the pro-life movement's attempt to change not just the laws on abortion, but the culture itself.<sup>27</sup> Although personhood amendments could be drafted to apply only to abortion, and thus be politically palatable in many majority-conservative states, such a move may dilute their attractiveness.

Third, the campaign against Measure 1 was highly successful in moving voters' preferences. Studies show that while political campaigns do have an effect,<sup>28</sup> "only 10–15% of voters are persuadable."<sup>29</sup> Given that (1) campaign messages tend to face "significant partisan resistance

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of resuscitation." She responded, "[t]hat might come about later." *A Bill Relating to the Inalienable Right to Life of Every Human Being at Every Stage of Development: Hearing on SCR 4009 Before the H. Hum. Servs. Comm.*, 63d Legis. Assemb., Reg. Sess. 2 (N.D. 2013) (statements of Rep. Kylie Oversen & Sen. Margaret Sitte), <https://www.legis.nd.gov/files/resource/63-2013/library/scr4009.pdf?20140810104335> [<https://perma.cc/U74P-8BET>]. The chair of ND Choose Life (the primary group supporting Measure 1) was asked in a radio interview whether the amendment would protect senior citizens from "aggressive end-of-life termination." She responded that the amendment "could" do so and that she supports "protecting the elderly." *Interview with Janne Myrdal on Measure 1 in North Dakota*, COMMON SENSE CLUB (Jan. 9, 2014, 07:41, 08:09), [http://www.podcast.flagfamily.com/dtlsxpyjc.html?name=2014-01-09\\_1-09-13\\_csc\\_hr\\_3\\_interview\\_janne\\_myrdal.mp3](http://www.podcast.flagfamily.com/dtlsxpyjc.html?name=2014-01-09_1-09-13_csc_hr_3_interview_janne_myrdal.mp3) [<https://perma.cc/6FFM-K4DR>]. A coordinator for ND Choose Life considered Measure 1 to be not just about abortion but about the right to life "at any age." Jill Schramm, *Wisconsin Anti-Abortion Group Promotes Measure 1 in N.D.*, MINOT DAILY NEWS (Aug. 13, 2014), <http://www.minotdailynews.com/page/content.detail/id/610331/Wisconsin-anti-abortion-group-promotes-Measure-1-in-N-D-.html?nav=5010> [<https://perma.cc/SUF7-U2AD>]. And the chair of North Dakota Right to Life, which endorsed Measure 1, stated that the amendment "doesn't pertain only to abortion; this pertains to every living human being." *ND Measure 1 on November Ballot Aims to Protect Life*, VALLEY NEWS LIVE (Apr. 30, 2014, 7:20 PM), <https://web.archive.org/web/20141001082757/http://www.valleynewslive.com/story/25390716/measure-1-on-november-ballot-aims-to-ban-abortion> [<https://perma.cc/E2LU-QW5X>].

27. The head of Mississippi's Pro-Life America Network explained, "[w]e have helped build a legal fence that helps protect women. The greater goal, even in legislation, is to influence the culture. This is a major culture war that isn't going away." SUZANNE STAGGENBORG, *SOCIAL MOVEMENTS* 153 (2d ed. 2016).
28. Doug J. Chung & Lingling Zhang, *Selling to a Moving Target: Dynamic Marketing Effects in US Presidential Elections* 3 (Harvard Bus. Sch., Working Paper No. 15-095, 2015), <https://dash.harvard.edu/bitstream/handle/1/17527694/15-095.pdf?sequence=1> [<https://perma.cc/A8JW-6S7D>]; Jim Granato & M. C. Sunny Wong, *Political Campaign Advertising Dynamics*, 57 POL. RES. Q. 349, 349 (2004).
29. Brian J. Brox & Daron R. Shaw, *Political Parties, American Campaigns, and Effects on Outcomes*, in *HANDBOOK OF PARTY POLITICS* 146, 148 (Richard S. Katz & William Crotty eds., 2006).

. . . or fall[] on deaf ears,”<sup>30</sup> (2) North Dakota overwhelmingly votes conservative,<sup>31</sup> and (3) Measure 1 was viewed as a conservative initiative, it is remarkable that the ultimate vote was 64.13% to 35.87% against Measure 1.<sup>32</sup> This nearly two-to-one ratio is comparable with other failed personhood amendment campaigns. Colorado’s limited personhood amendment in 2014 failed by a vote of 64.87% to 35.13%;<sup>33</sup> Mississippi’s personhood amendment failed in 2011 by a vote of 57.63% to 42.37%;<sup>34</sup> and other personhood amendment iterations in Colorado in 2010 and 2008 failed by margins of 70.53% to 29.47%<sup>35</sup> and 73.21% to 26.79%,<sup>36</sup> respectively.

Fourth, North Dakota’s campaign reflected the campaign in Mississippi and is likely to follow the same playbook in the future. Mississippi College of Law Professor Jonathan Will has documented some of the features of the Mississippi personhood campaign. He observed that early polling indicated the amendment would win; the final tally, however, was decisive against it.<sup>37</sup> The language of the amendment was ambiguous and entailed unintended consequences, including threatening the use of contraception and in vitro fertilization.<sup>38</sup> In fact, “major religious figures . . . did not support the measure, nor did the president

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30. *Id.*

31. And there is evidence that “partisan identification is uniformly associated with voting on ballot initiatives.” Regina P. Branton, *Examining Individual-Level Voting Behavior on State Ballot Propositions*, 56 POL. RES. Q. 367, 367 (2003).

32. *North Dakota “Life Begins at Conception” Amendment, Measure 1 (2014)*, BALLOTPEDIA, [https://ballotpedia.org/North\\_Dakota\\_%22Life\\_Begins\\_at\\_Conception%22\\_Amendment,\\_Measure\\_1\\_\(2014\)](https://ballotpedia.org/North_Dakota_%22Life_Begins_at_Conception%22_Amendment,_Measure_1_(2014)) [<https://perma.cc/YZK7-S733>] (last visited Oct. 7, 2016).

33. *Colorado Definition of “Personhood” Initiative, Amendment 67 (2014)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado\\_Definition\\_of\\_%22Personhood%22\\_Initiative,\\_Amendment\\_67\\_\(2014\)](https://ballotpedia.org/Colorado_Definition_of_%22Personhood%22_Initiative,_Amendment_67_(2014)) [<https://perma.cc/VMB6-EP8N>] (last visited Oct. 7, 2016).

34. *Mississippi Life Begins at the Moment of Fertilization Amendment, Initiative 26 (2011)*, BALLOTPEDIA, [https://ballotpedia.org/Mississippi\\_Life\\_Begins\\_at\\_the\\_Moment\\_of\\_Fertilization\\_Amendment,\\_Initiative\\_26\\_\(2011\)](https://ballotpedia.org/Mississippi_Life_Begins_at_the_Moment_of_Fertilization_Amendment,_Initiative_26_(2011)) [<https://perma.cc/QK8W-G7F5>] (last visited Oct. 7, 2016).

35. *Colorado Fetal Personhood, Initiative 62 (2010)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado\\_Fetal\\_Personhood,\\_Initiative\\_62\\_\(2010\)](https://ballotpedia.org/Colorado_Fetal_Personhood,_Initiative_62_(2010)) [<https://perma.cc/QF3L-48CU>] (last visited Oct. 7, 2016).

36. *Colorado Definition of Person, Initiative 48 (2008)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado\\_Definition\\_of\\_Person,\\_Initiative\\_48\\_\(2008\)](https://ballotpedia.org/Colorado_Definition_of_Person,_Initiative_48_(2008)) [<https://perma.cc/Y8FX-LG6D>] (last visited Oct. 7, 2016).

37. Will, *supra* note 18, at 584.

38. *Id.* at 584–85.

of the Mississippi NAACP.”<sup>39</sup> A variety of state-level groups also opposed it.<sup>40</sup> Supporters of the measure accused opponents of lying to voters and engaging in scare tactics.<sup>41</sup> And the question whether the amendment would have been self-executing became a flash point.<sup>42</sup> As this Article shows, these were all important features of the North Dakota campaign.

This Article proceeds in four Parts. Part I describes the history of personhood amendments, the campaign against Measure 1, and the likely future of other personhood campaigns in light of *Whole Woman's Health*. Part II sets forth the legal argument against Measure 1, which provided the basis for much of NDAM1's campaign. Part III presents the results of the survey I performed into why the anti-Measure 1 campaign was so successful. This Part also addresses potential concerns with survey methodology.<sup>43</sup> Part IV situates these insights in the context of extant empirical studies on other aspects of political campaigns. Part V discusses the extent to which the lessons of the Measure 1 campaign may or may not apply to other campaigns for reproductive rights.

## I. MEASURE 1 AND THE CAMPAIGN

To understand Measure 1, it is important to place it within its historical context as an important new part of the larger conflict over abortion rights. The campaign against Measure 1 also suggests the course of future personhood amendment campaigns.

### *A. The Historical Context*

Justice Blackmun's words in *Roe v. Wade* in 1973 gave birth to the personhood amendment. He wrote, “[i]f this suggestion of personhood is established, the . . . case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”<sup>44</sup> One week later, a United State Representative from

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39. *Id.* at 585.

40. *Id.*

41. *Id.*

42. *Id.* at 586–88.

43. For example, this survey suffers from a low sample size that is comprised only of NDAM1 members, who therefore may be subject to measurement bias. Chung & Zhang, *supra* note 28, at 3 (citing Kenneth Goldstein & Travis N. Ridout, *Measuring the Effects of Televised Political Advertising in the United States*, 7 ANN. REV. POL. SCI. 205 (2004)) (explaining that measurement bias entails “recall accuracy [that] may correlate with a voter's political predisposition”). The study, however, does offer some useful insights that positively correlate with empirical studies of other types of political campaigns.

44. *Roe v. Wade*, 410 U.S. 113, 156–57 (1973).

Maryland introduced a bill in the House, which would have provided due process and equal protection rights to “any human being, from the moment of conception.”<sup>45</sup> Many similar bills were introduced, and failed, from 1973 through 1981.<sup>46</sup>

In 1983, after the election of a number of pro-life candidates, the United States Senate held a floor vote on a human life amendment, which provided that the right to an abortion was not secured by the Constitution.<sup>47</sup> It failed by a vote of forty-nine to fifty.<sup>48</sup>

In 1986, Minnesota, followed quickly by North Dakota, were the first states to pass fetal homicide laws, providing that causing the death of an “unborn child” at any stage of prenatal development could be prosecuted as murder.<sup>49</sup> The majority of states have such laws today.<sup>50</sup> In 2004, Congress passed a similar federal law, the Unborn Victims of Violence Act.<sup>51</sup>

The modern personhood movement, reflected in North Dakota’s Measure 1, began in Colorado in 2008, when voters considered constitutional Amendment 48, which would have defined a constitutionally protected person as “any human being from the moment of fertilization.”<sup>52</sup> That amendment failed by a 73.21% to 26.79% margin.<sup>53</sup> From this campaign, however, emerged Personhood USA, a national group dedicated to ending abortion, in part through advocating for state-level personhood amendments.<sup>54</sup>

Despite its work, voters in Mississippi in 2011 rejected Initiative 26, a constitutional personhood amendment that would have defined

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45. H.R.J. Res. 261, 93d Cong. (1973).

46. H.R.J. Res. 427, 93d Cong. (1973); H.R.J. Res. 769, 93d Cong. (1973); S.J. Res. 91, 94th Cong. (1975); H.R.J. Res. 294, 96th Cong. (1979); S.J. Res. 110, 97th Cong. (1981).

47. S.J. Res. 3, 98th Cong. (2013).

48. *Id.*

49. MINN. STAT. §§ 609.266, 609.2661–609.2665, 609.268(1) (2016); N.D. CENT. CODE. §§ 12.1-17.1-01–12.1-17.1-04 (2016).

50. *Fetal Homicide State Laws*, NAT’L CONF. STATE LEGISLATURES (Mar. 4, 2015), <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> [<https://perma.cc/TA63-6KZA>] (noting that in 2015 at least thirty-eight states had fetal homicide laws).

51. 18 U.S.C. § 1841 (2012).

52. *Colorado Definition of Person, Initiative 48 (2008)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado\\_Definition\\_of\\_Person,\\_Initiative\\_48\\_\(2008\)](https://ballotpedia.org/Colorado_Definition_of_Person,_Initiative_48_(2008)) [<https://perma.cc/7B6M-CWWG>] (last visited Sept. 28, 2016).

53. *Id.*

54. *Petitions*, PERSONHOOD USA, <http://www.personhood.com/petitions> [<https://perma.cc/Y6D2-XU8J>] (last visited Oct. 4, 2016).

“person” to be “every human being from the moment of fertilization.”<sup>55</sup> The vote was 57.63% to 42.37%.<sup>56</sup> In 2012, the Oklahoma Supreme Court unanimously rejected a proposed ballot initiative that would have given embryos full personhood rights, ruling that the initiative was “clearly unconstitutional” because it would ban abortion.<sup>57</sup> Finally, another personhood amendment on the Colorado ballot in 2014 failed by a 64.87% to 35.13% vote.<sup>58</sup> On the same night, North Dakota voters rejected Measure 1 by a nearly identical margin.

### *B. Measure 1*

On March 25, 2013, the North Dakota legislative assembly passed a resolution to create and enact a new section to Article I of the Constitution of North Dakota, which would read, “The inalienable right to life of every human being at any stage of development must be recognized and protected.”<sup>59</sup> It was to be voted on by eligible North Dakota voters during the November 4, 2014, election and, as noted above, the measure failed in a twenty-eight-point landslide.

This initiative was known as “Measure 1” because it was the first ballot initiative of the 2014 election out of eight. The seven other ballot initiatives pertained to issues involving real estate taxes, higher education, direct democracy, oil revenues and conservation efforts, child custody, and pharmacy regulations, all of which were the subjects of heated campaigns. Voters rejected all but one of these measures.<sup>60</sup>

The campaign against Measure 1, NDAM1, was chaired by a well-known and long-time North Dakota Republican, and included a member of Planned Parenthood, a member of the ACLU, an IVF doctor,

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55. *Mississippi Life Begins at the Moment of Fertilization Amendment, Initiative 26* (2011), BALLOTPEDIA, [https://ballotpedia.org/Mississippi\\_Life\\_Begins\\_at\\_the\\_Moment\\_of\\_Fertilization\\_Amendment,\\_Initiative\\_26\\_\(2011\)](https://ballotpedia.org/Mississippi_Life_Begins_at_the_Moment_of_Fertilization_Amendment,_Initiative_26_(2011)) [https://perma.cc/4NWH-AGNQ] (last visited Sept. 28, 2016).

56. *Id.*

57. *In re Initiative Petition No. 395, State Question No. 761*, 286 P.3d 637, 637 (Okla. 2012); Laura Bassett, *Oklahoma Personhood Measure Struck Down by Supreme Court*, HUFFINGTON POST (Apr. 30, 2012, 4:45 PM) [https://www.huffingtonpost.com/2012/04/30/oklahoma-personhood-fetal-personhood-bill\\_n\\_1465657.html](https://www.huffingtonpost.com/2012/04/30/oklahoma-personhood-fetal-personhood-bill_n_1465657.html) [https://perma.cc/4MD8-6UKL].

58. *Colorado Definition of “Personhood” Initiative, Amendment 67* (2014), BALLOTPEDIA, [https://ballotpedia.org/Colorado\\_Definition\\_of\\_%22Personhood%22\\_Initiative,\\_Amendment\\_67\\_\(2014\)#cite\\_note-title-1](https://ballotpedia.org/Colorado_Definition_of_%22Personhood%22_Initiative,_Amendment_67_(2014)#cite_note-title-1) [https://perma.cc/2N35-EDNA] (last visited Sept. 28, 2016).

59. S. Con. Res. 4009, 63d Legis. Assemb., Reg. Sess. (N.D. 2013).

60. The sole successful initiative involved taxes on real property. *North Dakota 2014 Ballot Measures*, BALLOTPEDIA, [https://ballotpedia.org/North\\_Dakota\\_2014\\_ballot\\_measures](https://ballotpedia.org/North_Dakota_2014_ballot_measures) [https://perma.cc/WLD3-TD3C] (last visited Sept. 28, 2016).

me, and others. Supporters of Measure 1 were centered in the committee North Dakota Choose Life, and included a panoply of highly social-conservative and religious organizations, including North Dakota Choose Life, North Dakota Family Alliance, Concerned Women for America, and others.<sup>61</sup>

NDAM1's campaign formally began in late March 2014 with a booth at the North Dakota State Democrat–Nonpartisan League Convention. In the months between March and the election in November, the campaign arranged a number of events. First, numerous “house parties” were held around the state, during which individuals opposed to Measure 1 hosted informal gatherings at their houses to discuss Measure 1. Second, the campaign held fundraisers. Third, starting in June, church newsletters and local and national newspapers began to feature articles about Measure 1. In July, opponents began to write letters to the editor of state newspapers. Booths at statewide events were set up as well. In August, the campaign hired two field organizers in Grand Forks. These field organizers joined a coalition staff made up of the North Dakota Women's Network, North Dakota Planned Parenthood Advocate, and the ACLU. Staff were located in Bismarck, Fargo, and Grand Forks, the three largest cities in North Dakota. In August, newspapers and columnists began to express opposition to Measure 1. September saw the introduction of NDAM1's field plan rollout, which included phone banking, door knocking, and tabling every day at sites around the state. Newspaper articles and letters to the editor continued, the American College of OB-GYNs and the North Dakota Libertarian Party published their opposition to Measure 1, and NDAM1 released its white paper on the legal ramifications of Measure 1.<sup>62</sup> In October, the American Society for Reproductive Medicine, the Society for Assisted Reproductive Technology, and the North Dakota Medical Association published their opposition to Measure 1. And on October 6, NDAM1's first television advertisement aired. It featured the daughter of a popular former North Dakota governor, speaking about her

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61. This included the “Pro-Life Coalition,” North Dakota Life League, North Dakota Catholic Physicians Group, Fargo Guild of the Catholic Men's Association, Love Them Both, 40 Days for Life, North Dakota Right to Life, North Dakota Catholic Radio, FirstChoice Clinic, Saint Gianna Maternity Home, St. Thomas More Society of North Dakota, Grand Forks Women's Pregnancy Center, and the University of Mary. *North Dakota “Life Begins at Conception” Amendment, Measure 1 (2014)*, BALLOTPEDIA, [https://ballotpedia.org/North\\_Dakota\\_%22Life\\_Begins\\_at\\_Conception%22\\_Amendment,\\_Measure\\_1\\_\(2014\)](https://ballotpedia.org/North_Dakota_%22Life_Begins_at_Conception%22_Amendment,_Measure_1_(2014)) [https://perma.cc/W3P5-RVLK] (last visited Sept. 28, 2016).

62. I drafted this document. STEVEN R. MORRISON ET AL., POTENTIAL LEGAL RAMIFICATIONS OF MEASURE 1 (2014) <https://ndam1.org/wp-content/uploads/sites/11/2014/09/NDAM1-White-Paper-signed.pdf> [https://perma.cc/3864-RLUG].

father's passing and the need for do-not-resuscitate orders. One of NDAM1's major claims was that Measure 1 threatened the legal validity of such end-of-life directives.<sup>63</sup>

In early October, the Fargo Forum newspaper released a poll, showing that fifty percent of voters likely supported Measure 1, and thirty-three percent opposed it.<sup>64</sup> This poll was conducted before NDAM1's television advertising began to air. After this point, clergy and physicians in Bismarck published their opposition to Measure 1, another advertisement, featuring a long-time North Dakota doctor, began to air on October 19,<sup>65</sup> and by October 23, another Fargo Forum poll was released, suggesting that forty-five percent of North Dakotans now opposed Measure 1, and only thirty-nine percent supported it. Sixteen percent of respondents remained unsure of their position.<sup>66</sup> On October 26th, NDAM1 released a third advertisement, featuring a woman who had learned that the twins with whom she was pregnant would not survive, and warned that Measure 1 would interfere with the difficult decisions that she, her husband, and her doctor had to make.<sup>67</sup> Measure 1 was ultimately defeated on election day, November 4, 2014, by a vote of 64.13% to 35.87%.<sup>68</sup>

### *C. Measure 1 and the Future of Personhood Campaigns*

In the wake of the 2014 losses in Colorado and North Dakota—and the consistent losses before then—Gualberto Garcia Jones, a prominent pro-life advocate who had drafted the Colorado amendments, called on the personhood movement to abandon state-level ballot initiatives in

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63. NDAM1, *Nancy Guy*, YOUTUBE (Oct. 6, 2014), <https://www.youtube.com/watch?v=vN16ttFLYwE> [https://perma.cc/FNH5-FTFV].
64. Ryan Johnson, *ND Measure 1 Supporters, Opponents React to Poll Showing 'Right to Life' Approval*, INFORUM (Oct. 9, 2014, 10:20 PM), <https://www.inforum.com/content/nd-measure-1-supporters-opponents-react-poll-showing-right-life-approval> [https://perma.cc/S22S-8XHv].
65. NDAM1, *P1 ND1 DrJacobsen 101714*, YOUTUBE (Oct. 19, 2014), <https://www.youtube.com/watch?v=CwvJIx3u44w> [https://perma.cc/7ZGY-DVVW].
66. Ryan Johnson, *New Poll Shows 45 Percent Oppose, 39 Percent Support Measure 1*, INFORUM (Oct. 23, 2014, 7:12 PM) <http://www.inforum.com/content/new-poll-shows-45-percent-oppose-39-percent-support-measure-1> [https://perma.cc/BY4T-UT5T].
67. NDAM1, *Becky Shares Her Personal Story and Why She Is Voting No on Measure 1*, YOUTUBE (Oct. 26, 2014), <https://www.youtube.com/watch?v=YXmMgzmOANo> [https://perma.cc/KN3K-AWVB].
68. *North Dakota "Life Begins at Conception" Amendment, Measure 1 (2014)*, BALLOTPEdia, [https://ballotpedia.org/North\\_Dakota\\_%22Life\\_Begins\\_at\\_Conception%22\\_Amendment,\\_Measure\\_1\\_\(2014\)](https://ballotpedia.org/North_Dakota_%22Life_Begins_at_Conception%22_Amendment,_Measure_1_(2014)) [https://perma.cc/NZ8G-98UK] (last visited Sept. 28, 2016).



favor of local initiatives that might have a better chance at passing.<sup>69</sup> In 2014, other personhood proponents were also planning to pursue municipal initiatives.<sup>70</sup> This would appear to track the increasingly localized tack of the personhood movement: having failed consistently to achieve success at the federal level,<sup>71</sup> and then the state level, the movement may shift toward local ordinances.

Jones's analysis of personhood's failure suggests that the movement will not change substantively. Personhood's failure at the ballot box, he wrote, was the result of a number of factors. First, politicians, pro-life groups, and churches that were thought to be reliable supporters ultimately sabotaged the campaigns.<sup>72</sup> Second, other pro-life politicians offered tepid support at best.<sup>73</sup> Third, the "obscenely well-funded abortion lobby" poured money into the campaigns.<sup>74</sup> Fourth, "the media display[ed] an almost communist propagandistic bias against pro-

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69. Miranda Blue, *Personhood Leader: "The Statewide Personhood Ballot Measure Is Dead for Now,"* RIGHT WING WATCH (Nov. 10, 2014, 2:36 PM), <http://www.rightwingwatch.org/content/personhood-leader-statewide-personhood-ballot-measure-dead-now> [https://perma.cc/VE8U-KC9D].
70. *Personhood Alliance to Launch Municipal Ballot Initiatives on the Wake of the Colorado and North Dakota Votes*, PERSONHOOD (Oct. 29, 2014), <https://www.personhood.org/index.php/press/press-releases/personhood-alliance-to-launch-municipal-ballot-initiatives-on-the-wake-of-the-colorado-and-north-dakota-votes> [https://perma.cc/MLG9-Q2NV].
71. Within days of the Court's opinion in *Roe v. Wade*, Representative Lawrence Hogan (R-MD) introduced the very first joint resolution in support of an amendment to the federal Constitution which would guarantee a right to life to the unborn. H.R.J. Res. 261, 93d Cong. (1973). Over three-hundred constitutional fetal personhood amendments have been introduced in Congress, only one of which received a formal (failing) Senate vote. *Human Life Amendment*, HUM. LIFE ACTION CTR., <https://www.humanlifeactioncenter.org/issues/human-life-amendment> [https://perma.cc/V4RB-LWBC] (last visited Oct. 26, 2016); *Human Life Amendment Highlights: United States Congress (1973–2003)*, HUM. LIFE ACTION CTR., <https://www.humanlifeactioncenter.org/sites/default/files/HLAhighlts.pdf> [https://perma.cc/4J7Z-KPRB] (last visited Oct. 26, 2016). Members of Congress have also repeatedly introduced the Sanctity of Human Life Act, which seeks to define legal personhood as beginning at the single-celled zygote state of development. Sanctity of Human Life Act, H.R. 23, 113th Cong. (2013). Many thanks to Jonathan Will for these sources and the language I use to describe them.
72. Gualberto Garcia Jones, *It's Time for the Personhood Movement to Do Some Sober Analysis*, LIFESITENEWS (Nov. 7, 2014), <https://www.lifesitenews.com/opinion/its-time-for-the-personhood-movement-to-do-some-sober-analysis> [https://perma.cc/6W9M-WYGW].
73. *Id.*
74. *Id.*

lifers.”<sup>75</sup> He, notably, did not address the substantive concerns of personhood amendment opponents, preferring to focus on allegedly dishonest and disloyal people and organizations as the movement’s main failing.<sup>76</sup>

Jones’s prescription for future success is to control the battleground by focusing on local—not state-wide—elections to eliminate the dominance of metropolitan areas in state-wide elections. These areas are supposedly “opposed to [personhood’s] worldview,” are “the major media centers,” and have most of the voting population in any state.<sup>77</sup>

Wherever the personhood movement chooses to focus its energies, the North Dakota example suggests it will fail. In 2012, Gallup found that North Dakota was one of the three most conservative states in the nation (with Mississippi not far behind).<sup>78</sup> Americans United For Life issues an annual “Life List,” which ranks states based on “how well women are protected from abortion industry abuses.”<sup>79</sup> North Dakota was eighth (Mississippi was second).<sup>80</sup> Finally, North Dakota’s population is geographically dispersed. In July 2015, North Dakota had 756,927 residents.<sup>81</sup> The three largest cities in North Dakota—Fargo, Bismarck, and Grand Forks—had a total of 246,701 residents.<sup>82</sup> And these cities are not liberal enclaves. In the seventeen districts that comprised these metropolitan areas, Republican members of the Legislative Assembly outnumbered Democrats by thirty-two to nineteen.<sup>83</sup>

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75. *Id.*

76. *Id.*

77. *Id.*

78. See Frank Newport, *Alabama, North Dakota, Wyoming Most Conservative States*, GALLUP (Feb. 1, 2013) <https://www.gallup.com/poll/160196/alabama-north-dakota-wyoming-conservative-states.aspx> [<https://perma.cc/YM8L-5WRJ>] (reporting that the top three most conservative states were Alabama at 50.6% conservative, followed by North Dakota and Wyoming tied at 48.6%, with Mississippi fourth at 48.2%).

79. *AUL’s 2015 Life List*, AMERICANS UNITED FOR LIFE <http://www.aul.org/2015-life-list/> [<https://perma.cc/3RZB-FB7V>] (last visited Oct. 9, 2016).

80. *Id.*

81. *Quick Facts: North Dakota*, U.S. CENSUS BUREAU <https://www.census.gov/quickfacts/table/PST045215/38,3825700,3832060,3807200> [<https://perma.cc/LX9N-BTDY>] (last visited Oct. 9, 2016).

82. *Id.*

83. The 64th Assembly was active in 2015–2016. Bismarck, Fargo, and Grand Forks were represented by political party in the following proportions:

DISTRICT:      REPUBLICANS:      DEMOCRATS:

Bismarck

The North Dakota campaign, in short, suggests that Jones's autopsy is wrong, and that personhood supporters should look beyond mere geography for the source of their failures.

*D. Whole Woman's Health and its Effect on the Personhood Movement*

Like Jones, proponents of personhood amendments seem not to have grasped the reality that causes them consistently to lose in reliably conservative states. Even so, between the TRAP law and personhood amendment strategies, *Whole Woman's Health* has made the latter relatively more attractive.

In *Whole Woman's Health v. Hellerstedt*, the Supreme Court considered two Texas anti-abortion laws. The first required that all doctors who perform abortions must have admitting privileges at a nearby hospital.<sup>84</sup> The second required that certain abortion clinics meet building

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	7	3	0
	47	3	0
	35	2	1
	32	3	0
	30	3	0
Fargo:			
	44	2	1
	21	0	3
	13	3	0
	11	0	3
	16	1	2
	41	2	1
	46	2	1
	27	3	0
Grand Forks:			
	18	0	3
	42	0	3
	43	2	1
	17	3	0
	<b>17</b>	<b>32</b>	<b>19</b>

*64th Assembly Regular Members: By District*, N.D. LEGIS. COUNCIL, <https://www.legis.nd.gov/assembly/64-2015/members/members-by-district> [<https://perma.cc/8HSM-6BVR>] (last visited Oct. 9, 2016).

84. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299–300 (2016).

codes for ambulatory surgical centers.<sup>85</sup> The admitting privileges requirement was a problem for doctors because most hospitals grant privileges only if the doctor has treated a high number of patients in a hospital setting, accepts a faculty appointment, or meets other criteria unrelated to the doctor's competency or credentials.<sup>86</sup> Because legal abortions are very safe, no doctor that otherwise meets the standard of care for patients would have need to admit the requisite number of patients to a hospital.<sup>87</sup> The surgical center requirement was a problem because the renovations required to bring clinics up to code would be prohibitively expensive.<sup>88</sup> Furthermore, there was evidence that requiring clinics to meet surgical center codes would not support, and could actually harm, patient health.<sup>89</sup>

Texas's justification for these laws was that they were designed to ensure the health and safety of any woman who wanted to obtain an abortion.<sup>90</sup> The challengers countered that that justification was a pretext for enacting laws whose real purpose was to reduce access to

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85. *Id.*

86. *Id.* at 2312.

87. *Id.*

88. *Id.* at 2318.

89. *Id.*

90. Brief for Respondents at 31, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274). The real reason for these laws, to shut down abortion clinics, was patent. After the Texas bills passed, then-Lieutenant Governor David Dewhurst tweeted a photo of a map that showed all of the abortion clinics that would close as a result of the bill, writing: "We fought to pass SB5 thru the Senate last night, & this is why!" David Dewhurst (@DavidHDewhurst), TWITTER (June 19, 2013, 7:41 AM), <https://twitter.com/DavidHDewhurst/status/347363442497302528/photo/1> [<https://perma.cc/H4K3-DD93>]; see also Jim Vertuno, *Dewhurst Tweet Says Bill Attempt to Close Clinics*, STATESMAN (June 19, 2013, 2:28 PM), <http://www.statesman.com/news/state--regional-govt--politics/dewhurst-tweet-says-bill-attempt-close-clinics/jiQonVl2lSeNpb8ITPElNI/> [<https://perma.cc/2SJQ-5BDB>] (reporting that Dewhurst's comments suggest that supporters hope to "all but ban" abortion in Texas). This passage and citation was taken from Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1451-52 (2016). And after the Court issued its opinion, Texas Governor Greg Abbott acknowledged that the state's goal was "to protect innocent life, while ensuring the highest health and safety standards for women." Marina Fang, *Texas Governor Admits Anti-Abortion Law Was About Restricting Abortion*, HUFFINGTON POST (June 27, 2016, 3:22 PM), [http://www.huffingtonpost.com/entry/greg-abbott-texas-abortion-law\\_us\\_57717093e4b017b379f6cb23](http://www.huffingtonpost.com/entry/greg-abbott-texas-abortion-law_us_57717093e4b017b379f6cb23) [<https://perma.cc/2DPG-LF3Y>].

abortion, and that the laws in any event did not serve women's health in any way.<sup>91</sup>

As a result of these laws, a number of clinics in Texas closed, and more were likely to close,<sup>92</sup> requiring many women who could potentially exercise their right to an abortion to travel many miles to the nearest Texas abortion clinic, travel out of state, or both.<sup>93</sup>

The Supreme Court considered both of these laws under *Casey's* undue burden test,<sup>94</sup> revisiting *Casey's* standard that a law is unconstitutional if its "purpose or effect . . . is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."<sup>95</sup> This meant that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."<sup>96</sup>

The *Whole Woman's Health* Court, in turn, looked not only at the burden that the laws imposed, but also at their purpose and their effect on women's health.<sup>97</sup> Finding that their effect was to limit access to abortions and their benefit to women's health was insufficient, the Court struck down the Texas laws.<sup>98</sup>

If federal courts hew closely *Whole Woman's Health's* now-explicit proportionality review, considering both laws' burden on abortion and their potential health benefit to women, a large number of TRAP laws passed since 2010 and before may be unconstitutional,<sup>99</sup> and plans to introduce such bills in the future appear less promising. Pro-life legislators will certainly continue to present such bills, but their costs will be higher. Some voters will be less inclined to reelect legislators who seemingly waste government resources on obviously unconstitutional lawmaking, and the legislators may have to spend more political capital to garner support for less popular laws that are more likely to

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91. Brief for Petitioners at 2, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274).

92. Greenhouse & Siegel, *supra* note 90, at 1430.

93. Brief for Petitioners, *supra* note 91, at 20, 52.

94. *Whole Woman's Health*, 136 S. Ct. at 2299–300.

95. *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992)) (emphasis omitted).

96. *Id.* (citing *Casey*, 505 U.S. at 878).

97. *Id.*

98. *Id.*

99. Amanda Hollis-Brusky & Rachel VanSickel-Ward, *Here are Two Ways that Breyer's Wonky Opinion in Whole Woman's Health Could Transform Abortion Politics*, WASH. POST (Jul. 3, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/03/here-are-2-ways-that-breyers-wonky-opinion-in-whole-womens-health-could-transform-abortion-politics/> [https://perma.cc/9X2T-KWYZ].

struck down by courts. These legislators will also face opportunity costs by spending resources on unconstitutional laws that could have been spent elsewhere.

Enter personhood amendments. *Whole Woman's Health*, of course, did not consider the constitutionality of these amendments. Indeed, their vague and broad language does not make them facially unconstitutional; only in their application would a constitutional challenge present itself. Their message, furthermore, that all life is valued and should be protected, is a positive one. Where TRAP laws now face constitutional challenges and may be increasingly unpopular with voters,<sup>100</sup> personhood amendments are not constitutionally suspect and have the potential to be very popular. Although proponents of such amendments face a steep uphill battle, after *Whole Woman's Health*, personhood amendments are an increasingly better strategy for pro-life forces. They still, however, face serious legal and political obstacles.

## II. THE LEGAL ARGUMENT

NDAM1's campaign depended upon engaging a number of rhetorical modalities. Sympathetic spokespeople talked about how Measure 1 might have affected their personal medical decision-making.<sup>101</sup> Religious leaders spoke against enshrining a particular religious viewpoint in the state constitution.<sup>102</sup> Others opposed the measure on libertarian principles.<sup>103</sup> These modalities were all important in persuading voters. The legal argument against Measure 1, however, provided a roadmap for the entire campaign, giving objective credibility to individuals' important concerns and support to NDAM1's talking points.

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100. See Lydia Saad, *Americans Choose "Pro-Choice" for First Time in Seven Years*, GALLUP (May 29, 2015), <http://www.gallup.com/poll/183434/americans-choose-pro-choice-first-time-seven-years.aspx> [https://perma.cc/WZ7Y-6XKK] (noting that fifty percent of Americans identify as "pro-choice" and "generally support broad abortion rights" while only forty-four percent of Americans identify as "pro-life").

101. Ann Crews Melton, *Local Faith Communities Organize Around Measure 1*, BISMARCK TRIBUNE (Oct. 11, 2014), [http://bismarcktribune.com/lifestyles/faith-and-values/local-faith-communities-organize-around-measure/article\\_86a4c35e-4fcd-11e4-991c-47354297e8c8.html](http://bismarcktribune.com/lifestyles/faith-and-values/local-faith-communities-organize-around-measure/article_86a4c35e-4fcd-11e4-991c-47354297e8c8.html) [https://perma.cc/9FUG-V9RD].

102. *Id.*

103. *Libertarian Party Opposes Measure 1*, PIERCE COUNTY TRIBUNE (Sept. 26, 2014), <https://www.thepiercecountytribune.com/page/content.detail/id/510028/Libertarian-Party-opposes-Measure-1.html> [https://perma.cc/K4PG-7ZSF].

### *A. Definitions*

Measure 1 started in February 2013 as Senate Concurrent Resolution No. 4009. It passed in the North Dakota Senate by a vote of twenty-six to twenty-one.<sup>104</sup> On March 22, 2013, it passed in the House by a vote of fifty-seven to thirty-five.<sup>105</sup> It appeared on a statewide ballot in November 2014 as Measure 1.<sup>106</sup> Had voters approved it, it would have appeared as a new section in Article I of the North Dakota Constitution.<sup>107</sup> Measure 1 read: “The inalienable right to life of every human being at any stage of development must be recognized and protected.”<sup>108</sup> Three parts of Measure 1 were particularly relevant: the inalienable right to life, the definition of life, and the obligation to protect life.

#### 1. The Inalienable Right to Life

Measure 1 provided to every resident of North Dakota an “inalienable right to life.”<sup>109</sup> This provision mirrored language in the Declaration of Independence, that all men have “certain unalienable Rights,” including the right to “Life.”<sup>110</sup> The United States Constitution contains no such clear right to life, but it has been read to contain an implied interest in life.<sup>111</sup>

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104. Dave Thompson, *North Dakota Anti-Abortion Amendment for State Ballot Clears Senate*, REUTERS (Feb. 7, 2013, 6:50 PM), <http://www.reuters.com/article/us-usa-abortion-northdakota-idUSBRE91618Z20130207> [<https://perma.cc/4Q26-UJJE>].

105. Laura Bassett, *North Dakota Personhood Measure Passes State House*, HUFFINGTON POST (Mar. 22, 2013, 3:20 PM), [http://www.huffingtonpost.com/2013/03/22/north-dakota-personhood\\_n\\_2934503.html](http://www.huffingtonpost.com/2013/03/22/north-dakota-personhood_n_2934503.html) [<https://perma.cc/N8DG-KVNJ>].

106. *Id.*

107. S. Con. Res. 4009, 63d Legis. Assemb., Reg. Sess. (N.D. 2013).

108. *Id.*

109. *Id.*

110. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

111. There are only three references to “life” in the United States Constitution. See U.S. CONST. art. III, § 3, cl. 2 (dealing with charges of treason during the “Life of the Person” charged with treason); U.S. CONST. amend. V (providing that a criminal defendant shall not “be twice put in jeopardy of life or limb” and that individuals shall not “be deprived of life . . . without due process of law”); U.S. CONST. amend. XIV, § 1 (providing that states shall not “deprive any person of life . . . without due process of law”).

## 2. The Definition of Life

Measure 1 would have protected life in North Dakota “at any stage of development.”<sup>112</sup> The legislature has not defined when life begins.<sup>113</sup> Measure 1 supporters, however, were clear as to that point: Senator Margaret Sitte, who introduced Measure 1 in the legislative assembly, said that life begins at conception.<sup>114</sup> Other supporters echoed this belief.<sup>115</sup>

Indeed, supporters of Measure 1 asserted that the amendment should have an effect at the very beginning of life through to the end. During legislative debate on Measure 1, Senator Sitte was asked whether Measure 1 could prohibit living wills. Sitte responded, “That might

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112. *North Dakota “Life Begins at Conception” Amendment, Measure 1 (2014)*, *supra* note 61.

113. The North Dakota legislature has, however, defined when life ends by adopting the Uniform Determination of Death Act, which declares that death occurs when someone has “sustained either irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functions of the entire brain, including the brain stem.” N.D. CENT. CODE § 23-06.3-01 (2016). This is a dual, or disjunctive, definition of death, as it can be met by cardiac death, *see* Rob Stein, *A Struggle to Define ‘Death’ for Organ Donors*, NPR (Mar. 28, 2012, 10:30 AM), <http://www.npr.org/blogs/health/2012/03/27/149463045/a-struggle-to-define-death-for-organ-donors> [<https://perma.cc/L637-M86R>] (defining cardiac death as “an irreversible cessation of circulation and heartbeat and breathing and no intervention will be done to restore it”), or brain death. *See* Ajay Kumar Goila & Mridula Pawar, *The Diagnosis of Brain Death*, 13 INDIAN J. CRIT. CARE MED. 7, 8 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2772257/> [<https://perma.cc/DXS6-PPTU>] (providing the accepted definition of brain death as “the irreversible loss of all functions of the brain, including the brainstem, [and that t]he three essential findings in brain death are coma, absence of brainstem reflexes, and apnoea”); *see also* N.Y. STATE DEP’T OF HEALTH & N.Y. STATE TASK FORCE ON LIFE & THE LAW, GUIDELINES FOR DETERMINING BRAIN DEATH (2011), [https://www.health.ny.gov/professionals/hospital\\_administrator/letters/2011/brain\\_death\\_guidelines.pdf](https://www.health.ny.gov/professionals/hospital_administrator/letters/2011/brain_death_guidelines.pdf) [<https://perma.cc/MYJ7-YUUV>] (comprehensive instructions for determining brain death).

114. Margaret Sitte, *Abortion Discussion*, MINOT DAILY NEWS (Jun. 2, 2013), <http://www.minotdailynews.com/page/content.detail/id/575966/Abortion-discussion.html> [<https://perma.cc/UR63-PEQC>].

115. *North Dakota Lawmakers Move to Ban Abortion by Defining Life as Starting at Conception*, CBS NEWS (Mar. 22, 2013, 7:52 PM) [hereinafter *North Dakota Lawmakers*], [http://www.cbsnews.com/8301-201\\_162-57575901/north-dakota-lawmakers-move-to-ban-abortion-by-defining-life-as-starting-at-conception/](http://www.cbsnews.com/8301-201_162-57575901/north-dakota-lawmakers-move-to-ban-abortion-by-defining-life-as-starting-at-conception/) [<https://perma.cc/27QR-454S>]; TeamSarah4Choice, *Is ND Republican Margaret Sitte Vying to Open Coat Hanger Factories 2Replace Medical Abortions*, DAILY KOS (Feb. 8, 2013, 10:33 AM), <https://www.dailykos.com/story/2013/02/08/1185518/-Is-ND-Republican-Margaret-Sitte-vying-to-open-Coat-Hanger-Factories-2Replace-Medical-Abortions> [<https://perma.cc/F3E3-Z6PY>].



come about later.”<sup>116</sup> Janne Myrdal, Chair of North Dakota Choose Life (the primary group supporting Measure 1), was asked in a radio interview whether the amendment would protect senior citizens from “aggressive end-of-life termination.” She responded that the amendment “could” do so, and that she supports “protecting the elderly.”<sup>117</sup> The *Minot Daily News* reported that Tim Knutson, Minot coordinator for North Dakota Choose Life, considered Measure 1 to be not just about abortion, but about the right to life “at any age.”<sup>118</sup> And John Trandem, Chair of North Dakota Right to Life, which has endorsed Measure 1, stated that the amendment “doesn’t pertain only to abortion; this pertains to every living human being.”<sup>119</sup>

### 3. The Obligation to Protect the Right to Life

Measure 1 provided that the right to life “must” be recognized and protected, suggesting that Measure 1 would have departed from the usual role of a constitution as a document of negative rights,<sup>120</sup> and was to be a provision that sets forth a positive right.<sup>121</sup> This obligation would have imposed an additional duty on the North Dakota government to

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116. *2013 House Standing Committee Minutes: Hearing on SCR 4009 Before the H. Human Servs. Comm.*, 63d Legis. Assemb., Reg. Sess. 2 (N.D. 2013) (statement of Sen. Margaret Sitte), <https://www.legis.nd.gov/files/resource/63-2013/library/scr4009.pdf?20140810104335> [<https://perma.cc/6LLV-FAAX>].
117. *Interview with Janne Myrdal on Measure 1 in North Dakota*, COMMON SENSE CLUB (Jan. 9, 2014, 07:41, 08:09), [http://www.podcast.flagfamily.com/dtzsxpjyc.html?name=2014-01-09\\_1-09-13\\_csc\\_hr\\_3\\_interview\\_janne\\_myrdal.mp3](http://www.podcast.flagfamily.com/dtzsxpjyc.html?name=2014-01-09_1-09-13_csc_hr_3_interview_janne_myrdal.mp3) [<https://perma.cc/6FFM-K4DR>].
118. Jill Schramm, *Wisconsin Anti-Abortion Group Promotes Measure 1 in N.D.*, MINOT DAILY NEWS (Aug. 13, 2014), <http://www.minotdailynews.com/page/content.detail/id/610331/Wisconsin-anti-abortion-group-promotes-Measure-1-in-N-D-.html> [<https://perma.cc/DS3U-TYNV>].
119. *ND Measure 1 on November Ballot Aims to Protect Life*, VALLEY NEWS LIVE, <http://archive.is/xzAUY> [<https://perma.cc/9UK2-MGH7>] (last updated Apr. 30, 2014).
120. *See State v. Ertelt*, 548 N.W.2d 775, 776 (N.D. 1996) (providing that the “North Dakota Constitution is an instrument of limitations of authority to enact legislation”) (internal quotations omitted); *Daly v. Beery*, 178 N.W. 104, 111 (N.D. 1920) (explaining that the usual purpose of the North Dakota Constitution is to “place a limitation . . . on those to whom [the people] have delegated certain powers, so as to prevent an abuse of the powers”).
121. This is not unprecedented, as constitutions regularly contain some positive rights. These include, for example, the requirement that all searches and seizures be reasonable, *State v. Herrick*, 567 N.W.2d 336, 341 (N.D. 1997), that the legislature provide free public schools, *Bismarck Pub. Sch. Dist. 1 v. State*, 511 N.W.2d 247, 263 (N.D. 1994) (Sandstrom, J., dissenting), and that public money be expended only by legislative appropriation, *Mun. Servs. Corp. v. Kusler*, 490 N.W.2d 700, 704 (N.D. 1992).

recognize and protect every resident's right to life at any stage of development.<sup>122</sup>

Although the provision of positive rights in American state or federal constitutions is not unusual, no other such constitution imposes upon the government a positive duty to protect life. In contrast, other countries do provide for such a right, with interesting results. India's right to life, for example, "has resulted in several significant advancements in the area of tobacco control regulation."<sup>123</sup> This also includes the right to food and adequate nutrition, which has compelled Indian courts to order "the release of national stocks of surplus food-grains to famine stricken communities [and] nationally sponsored lunch programs."<sup>124</sup> The Indian Supreme Court has also held that a woman's right to life includes the right to be free from workplace sexual harassment.<sup>125</sup> The right to life has also been interpreted to mean "the right to a healthy and pollution-free environment."<sup>126</sup>

Similarly, Indonesia's high court has held that citizens have a "right to water, and that the government is obligated to meet 'the daily needs of every individual.'"<sup>127</sup> The Nigerian Federal High Court "ordered the cessation of gas flaring in the Niger Delta community because it 'violates guaranteed constitutional rights to life and dignity.'"<sup>128</sup>

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122. *See* *Doherty v. Ransom Cty.*, 63 N.W. 148, 149 (N.D. 1895) ("[W]e are constrained to view our constitutional provision, not as a grant of power, but as a limitation upon power . . . . For that purpose the constitutions generally, if not universally, use the word 'may.' Here the mandatory word 'shall' is used.").
123. Oscar A. Cabrera & Juan Carballo, *Tobacco Control Litigation: Broader Impacts on Health Rights Adjudication*, 41 J.L. MED. & ETHICS 147, 151 (2013).
124. Michael J. McDermott, *Constitutionalizing an Enforceable Right to Food: A New Tool for Combating Hunger*, 35 B.C. INT'L & COMP. L. REV. 543, 544 (2012).
125. *Annotated Legal Bibliography on Gender*, 18 CARDOZO J.L. & GENDER 531, 573 (2012) (citing Daphne Barak-Erez & Jayna Kothari, *When Sexual Harassment Law Goes East: Feminism, Legal Transplantation, and Social Change*, 47 STAN. J. INT'L L. 175, 179 (2011)).
126. Robert Carnwath, *Institutional Innovation for Environmental Justice*, 29 PACE ENVTL. L. REV. 555, 557 (2012).
127. George S. McGraw, *Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence*, 8 LOY. U. CHI. INT'L L. REV. 127, 181 (2011).
128. Randall S. Abate & Elizabeth Ann Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples*, 26 TUL. ENVTL. L.J. 179, 194 (2013).

*B. The Question of Self-Execution*

Constitutional provisions may or may not be self-executing. If a provision is self-executing, then, “no further legislation is necessary to make it operative.”<sup>129</sup> Provisions are self-executing when they explicitly declare themselves to be so, or when “a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced.”<sup>130</sup> Provisions may not be self-executing when they “merely indicate[] principles, without laying down rules by means of which those principles may be given the force of law.”<sup>131</sup>

The question whether Measure 1 would have been self-executing<sup>132</sup> became a relevant topic in the campaign. To determine whether a constitutional provision is self-executing, the North Dakota Supreme Court looks to provisions’ language for two indicia. First, an amendment will generally *not* be self-executing if the provision contains language such as “as provided by law,” “unless otherwise provided by law,” “shall be fixed by law,” “as may be prescribed by law,” and “[t]he legislative assembly may provide for.”<sup>133</sup> This signals that the provision’s execution rests not on its own language, but on other enabling legislation. Second, the Supreme Court asks whether the language can be interpreted on its own, or whether additional legislative support is necessary to put it into effect.<sup>134</sup>

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129. *Gray v. Va. Sec’y of Transp.*, 662 S.E.2d 66, 71 (Va. 2008).

130. *Id.* at 71–72.

131. *Id.* at 72 (quoting *Robb v. Shockoe Slip Found.*, 324 S.E.2d 674, 676 (Va. 1985)).

132. “[A] constitutional provision becomes immediately operative only if it is a self-executing provision . . . .” *State ex rel. Vogel v. Garaas*, 261 N.W.2d 914, 918 (N.D. 1978). Self-executing provisions are those that establish “a sufficient rule by which its purpose can be accomplished without the need of legislation to give it effect.” *Id.* A self-executing provision is one that the judiciary can enforce without the assistance of a legislative enactment. *Davis v. Burke*, 179 U.S. 399, 403 (1900) (declaring a provision of the Idaho constitution to be self-executing since “where a constitution asserts a certain right, . . . it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions”). If the provision is self-executing, then no further legislation is necessary to put it in force. *Id.*; see also *Vogel*, 261 N.W.2d at 918 (“[A] constitutional provision becomes immediately operative only if it is a self-executing provision.”). In contrast, a provision is non-self-executing if it requires appropriate legislation to implement its objective. *Vogel*, 261 N.W.2d at 918. Non-self-executing provisions are those that “merely establish[] general objectives, without setting forth rules by which those objectives can be accomplished such that the provision must remain inoperative until appropriate legislation is enacted to give it effect.” *Id.*

133. *State ex rel. Agnew v. Schneider*, 253 N.W.2d 184, 187–88 (N.D. 1977).

134. *Id.* at 192 (finding a constitutional provision was not self-executing because it “did not contain all of the necessary prerequisites so as to make it self-

There was no “as provided by law” language in Measure 1. Furthermore, while the terms contained in Measure 1 might have required additional *definition*, they did not necessarily require additional *legislation* to be put into force. It is the judiciary’s province to provide the definition of terms like “life,” “must,” “recognize,” and “protect,” and it is capable of doing so. Therefore, it was possible (but by no means certain) that the North Dakota courts would have found Measure 1 to be self-executing. This meant that upon inclusion of the Amendment in the North Dakota Constitution, all government agents would have been obligated to take immediate steps to protect the right to life at any stage of development.<sup>135</sup> This was a point that NDAM1 made, because it rested its argument in large part on the unintended consequences that Measure 1 could produce, despite any legislative attempt to limit its application.

*C. The Potential Legal Ramifications of a Self-Executing Amendment*

If Measure 1 were self-executing, then government agents would be mandated to take official action based solely upon the amendment, independent of any enabling legislation. This grounded NDAM1’s unintended consequences argument, with some important specific possibilities concerning issues ranging from abortion to end-of-life care.

1. Abortion and Medical Decision-Making

Supporters of Measure 1 hoped it would end abortion in North Dakota.<sup>136</sup> While Measure 1 would not have nullified *Roe*, *Casey*, or *Whole Woman’s Health*, there is little doubt that anti-abortion advocates would have used the amendment to challenge these cases in an effort to end abortion in North Dakota.

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executing but its implementation required legislation, and without legislation it was uncertain exactly how to proceed”).

135. Contrary to the statements of Measure 1 supporters, the North Dakota Supreme Court has found constitutional provisions to be self-executing. See *Vogel*, 261 N.W.2d at 918 (“A constitutional provision is self-executing if it establishes a sufficient rule by which its purpose can be accomplished without the need of legislation to give it effect.”); State *ex rel.* Syvertson v. Jones, 23 N.W.2d 54, 69 (N.D. 1946) (“Insofar as Article 56 segregates the revenue arising from the taxes and fees specified therein and prohibits the appropriation and use of such revenue for purposes other than those therein specified, it is self-executing . . . .”); State *ex rel.* Reese v. Mooney, 255 N.W. 105 (N.D. 1934) (holding § 173 of the Constitution to be self-executing); Great N. Ry. Co. v. Duncan, 176 N.W. 992, 995 (N.D. 1919) (holding prohibitory constitutional debt limits to be self-executing); State *ex rel.* Twichell v. Hall, 171 N.W. 213, 221 (N.D. 1918) (finding the Fifteenth and Sixteenth Amendments to be self-executing).

136. *North Dakota Lawmakers*, *supra* note 115; TeamSarah4Choice, *supra* note 115.

This use could have come in many, admittedly speculative, forms. An executive branch official could shut down the state's sole clinic that provides abortions. A prosecutor could charge clinic operators criminally. It is most likely, however, that members of the legislative assembly would have attempted to pass Measure 1-inspired anti-abortion laws.<sup>137</sup> Indeed, the legislature might have been *required*—due to Measure 1's "must" language—to pass every law it could to eliminate a woman's right to choose an abortion short of the *Roe/Casey* limit. This could have included laws that lengthen the waiting period for an abortion, impose stricter regulations on clinics within the limits now set in *Whole Woman's Health*, increasingly restrict the right of minors to obtain an abortion, and so forth.<sup>138</sup>

Cases in which a pregnant woman must obtain an abortion to preserve her own life would have presented an intractable conflict. Pursuant to Measure 1, the state would have been obligated to protect the right to life of the woman no less than that of the fertilized ova, embryo, or fetus. If only one life can survive, the state would have to decide whether the mother or the fetal life will die. Either way, the state would have violated North Dakota's constitution, and could have been subject to a lawsuit and money damages.<sup>139</sup> Furthermore, if the

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137. The legislative assembly in its 2013 session passed a number of anti-abortion laws that clearly or quite probably violate federal constitutional rights under *Roe v. Wade* and/or *Planned Parenthood v. Casey*. See MKB Mgmt. Corp. v. Burdick, 16 F. Supp. 3d 1059, 1074 (D.N.D. 2014) (holding HB 1456 unconstitutional under *Roe* and *Casey*). To be sure, these and other such laws do not depend upon Measure 1 for their validity. To the extent that they contradict the *Roe* or *Casey* holdings, Measure 1 will not save them.

138. To be clear, Measure 1 was not *necessary* for this legislation; as long as laws satisfy *Roe*, *Casey*, and all other constitutional requirements, they can be passed without Measure 1. The amendment could have, however, *mandated* such laws. Indeed, Measure 1 could *force* the North Dakota government to challenge *Roe* and *Casey*, even if the resulting legal actions are expensive and frivolous.

139. For example, in up to two percent of pregnancies, a fertilized ova remains in the fallopian tube, which is called an ectopic pregnancy. During such pregnancies, the mother's life is in danger, and the fertilized ova will not survive the treatment. *What to Know About Ectopic Pregnancy*, WEBMD, <http://www.webmd.com/baby/guide/pregnancy-ectopic-pregnancy> [<https://perma.cc/KMR4-EHW9>] (last visited Oct. 9, 2016). An extreme interpretation of Measure 1 would threaten a doctor's legal right to treat ectopic pregnancy and the mother's consent to such treatment. This interpretation would entail the treatment being considered to be murder. The state might not want to adopt this interpretation, for obvious political and public safety reasons. Measure 1, however, could be read to *require* the state to do so, and therefore to interfere with the patient-doctor relationship to ensure a number of things: whether the diagnosed ectopic pregnancy is really an ectopic pregnancy, whether there are alternative treatments, and so forth. While the state would probably not *prohibit* treatment for ectopic pregnancies, it may be required under Measure 1 to become involved in a

state prevents the woman from obtaining an abortion when necessary to preserve her life, the state would have violated the mother's constitutional right of "enjoying and defending [her own] life."<sup>140</sup>

## 2. In Vitro Fertilization

Assuming that "life" for the purpose of Measure 1 begins at fertilization, the state could have been required to treat the process of IVF as murder.

During the administration of IVF, ova are extracted from the woman and are mixed in a lab with sperm. As a result, a number of ova are fertilized. As long as five days after fertilization, one or more of the fertilized ova are transferred into the woman's uterus. To increase the chance of pregnancy, doctors generally transfer more than one fertilized ovum at one time. One or more of the ova usually do not survive; IVF doctors and their patients are aware of this fact and expect it. Furthermore, some ova remain unused in the process.

North Dakota law currently defines murder as when one "[i]ntentionally or knowingly causes the death of another human being"<sup>141</sup> or when one "[c]auses the death of another human being under circumstances manifesting extreme indifference to the value of human life."<sup>142</sup> Assuming, then, that life begins at conception, doctors who administer IVF would apparently be acting with the intent or at least with indifference to the lives of the multiple ova that are either fertilized but not transferred to the woman's uterus, or are transferred but do not survive. Nurses, clinic or hospital staff, and other medical assistants could be guilty of accomplice crimes, including conspiracy to murder. Women and men who hope to become parents through IVF could also be criminally liable.

The freezing of embryos for later use could also be prohibited. Couples often freeze embryos if the woman has an illness, such as cancer, and will undergo treatment that could harm the ova in her body. Couples may simply want to freeze embryos for later implantation. A substantial percentage of frozen embryos will not survive the freezing and thawing process, and couples may decide to otherwise dispose of the frozen embryos. Because it is highly likely that some frozen embryos will not survive, Measure 1 might have required that the state treat this process as murder.

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mother's and her doctor's health care decisions to ensure that the life of the fertilized ova is protected if at all possible.

140. N.D. CONST. art. I, § 1.

141. N.D. CENT. CODE § 12.1-16-01(1)(a) (2016).

142. *Id.* § 12.1-16-01(1)(b).

### 3. Extraordinary End-of-Life Care

Measure 1 would not differentiate between lives at their beginning and at their end. The amendment, therefore, would obligate the state to protect the right to life at its end. This could have obligated the state to pay for extraordinary end-of-life care. Where children want to withdraw life support from a parent who would not survive without it, Measure 1 could have obligated the state to interfere with the child-parent relationship to protect the person on life support.

Measure 1 might also have forced courts to nullify the effect of residents' living wills, advance health care directives, and do-not-resuscitate ("DNR") orders that mandate the withdrawal of life support where withdrawal would end patients' lives.

Measure 1 supporters claimed that living wills and DNR orders would be protected because a state statute provides for them.<sup>143</sup> This is an incorrect statement of law. Living wills and DNR orders facilitate the end of life, which may conflict with Measure 1's requirement that the state protect the right to life. Living wills and DNR orders operate when patients are incompetent to express whether or not they want extraordinary life-sustaining care. Measure 1 could render any action that ends such lives to be illegal and the living will/DNR statute to be unconstitutional. Given the comments of Senator Sitte, Janne Myrdal, Tim Knutson, and John Trandem, noted above, it appears that Measure 1 supporters fully expected the amendment to undermine living wills, DNR orders, and the like.

To counter this allegation, Measure 1 supporters relied on *Cruzan v. Director, Missouri Department of Health*<sup>144</sup> for the proposition that the federal constitution protects end-of-life options. This is, however, far from clear.

The *Cruzan* Court, in fact, held that states can permissibly require a high standard of proof of a patient's wishes before that patient's life-sustaining treatment can be withheld.<sup>145</sup> The case involved a Missouri woman, Nancy Cruzan, who was in a persistent vegetative state from which she would never recover.<sup>146</sup> She had expressed to friends, while competent, that she would not want extraordinary life-sustaining

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143. Laurie Kraemer, Letter to the Editor, *Foes Wildly Exaggerate Measure 1*, GRAND FORKS HERALD (Oct. 26, 2014, 5:30 AM), <http://www.grandforksherald.com/content/letter-foes-wildly-exaggerate-measure-1> [<https://perma.cc/48P7-YVK2>]; Rodger Wetzel, Letter to the Editor, *Measure 1: End-of-Life Rights Already Protected*, GRAND FORKS HERALD (Oct. 25, 2014, 3:15 AM), <http://www.grandforksherald.com/content/letter-measure-1-end-life-rights-already-protected> [<https://perma.cc/QNP2-74CH>].

144. 497 U.S. 261 (1990).

145. *Id.* at 282, 286–87.

146. *Id.* at 266.

treatment if she were in a vegetative state.<sup>147</sup> While the Court *implied* that Nancy had the right to have her wishes honored, it did not explicitly say so.<sup>148</sup> Indeed, the Court did not even hold that a *competent* person has the right to refuse life-sustaining treatment.<sup>149</sup>

Whether an incompetent person has the right to die with dignity and whether we all have the right to a living will are two legal questions that remain unsettled. There is currently no federal constitutional right to any of these end-of-life options. Justice Scalia, in *Cruzan*, suggested that these were issues for the states to decide.<sup>150</sup> Measure 1 would have reflected Justice Scalia's states'-rights approach; the federal constitution offers no certain protection.

Measure 1 supporters claimed they wanted to promote the "dignity of patients facing the end of their lives" and used *Cruzan* to bolster their claim.<sup>151</sup> This desire, however, has more in common with the dissenting Justices in that case than with the majority. Justice Brennan protested that the majority opinion rejected *Cruzan*'s right to have her end-of-life preferences honored,<sup>152</sup> and Justice Stevens lamented that the Court sided with the state's "abstract, undifferentiated interest in the preservation of life," discounting *Cruzan*'s preferences.<sup>153</sup> *Cruzan*, in fact, reaffirmed the state's right to intrude upon end-of-life decisions.<sup>154</sup> Measure 1 might have doubled down on *Cruzan*, taking a panoply of end-of-life options away from North Dakotans as a constitutional matter.

In sum, should Measure 1 have become part of the North Dakota Constitution, its effect would have been unprecedented, wide-ranging, and unpredictable. If it were self-executing, every North Dakota government official would have been obligated to follow its mandate. If it were not self-executing, the legislative assembly would have been obligated to enact enabling laws. In any event, North Dakota would have been the first state to impose upon itself the positive duty to protect life from fertilization of the ova to irreversible cardiac or brain death. While supporters of Measure 1 hoped this would end abortion in North Dakota, it is much more likely that Measure 1 would have impelled

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147. *Id.* at 265–68.

148. *Id.* at 268.

149. *Id.* at 279.

150. *Id.* at 293, 298 (Scalia, J., concurring).

151. Rodger Wetzel et al., *Statement on Misleading Representations About Measure 1 and End-of-Life Care Decisions*, BISONCATHOLIC, <http://www.bisoncatholic.org/blog/71-misleading-measure-1> [<https://perma.cc/9A7H-WH7U>] (last visited Oct. 25, 2016).

152. *Cruzan*, 497 U.S. at 302 (Brennan, J., dissenting).

153. *Id.* at 331 (Stevens, J., dissenting).

154. *Id.* at 284, 286–87.



North Dakota toward a holistic, state-sponsored pre-cradle-to-grave approach to residents' welfare.

This would have had some interesting consequences. In addition to those detailed above, residents of North Dakota might have been guaranteed state-sponsored health care, adequate housing, and nutritious food. The state may have had to provide prenatal and early childhood care. Law enforcement officers may have been required to enforce restraining orders to protect battered or threatened partners. Protecting residents against environmental pollution could have become constitutionally mandated. Measure 1's unintended consequences could have reached far beyond abortion.

### III. THE SURVEY OF NDAM1 MEMBERS

Although NDAM1 felt that it had a winning *legal* argument, the campaign knew that it had to operate an effective *political* campaign. To determine why the campaign was ultimately so successful, I performed a survey of the most active members of NDAM1<sup>155</sup> to determine what they believed were the causes of the campaign's success.

I chose this group because, as a member of NDAM1, I had access to the group and its trust. NDAM1 opponents would not have been receptive to my inquiry. Financial limitations, furthermore, prevented me from polling a representative size of the North Dakota electorate.<sup>156</sup>

While there were potential problems with (1) such a small sample size (2) of potentially biased subjects, this study minimized those problems.

As to sample size, the survey targeted the individuals who had the greatest insight into the NDAM1 campaign. Voting population respondents would have been able to say why they as individuals voted the way they did, but they would likely have been unable to offer broadly applicable reasons why the campaign was successful overall. NDAM1's opponents, in turn, would likely suffer greater biases than NDAM1 committee members, and would therefore offer less reliable responses. At the very least, polling only NDAM1 members promises unique and reliable insights.<sup>157</sup>

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155. These most active members were those who participated in regularly scheduled conference calls for committee members or who were actively engaged as public figures by, for example, speaking or writing op-eds about Measure 1.

156. This is, indeed, a common constraint. See P. L. Schwagmeyer & Douglas W. Mock, *How to Minimize Sample Sizes While Preserving Statistical Power*, 54 ANIMAL BEHAV. 470, 470 (1997).

157. This is why polling companies code respondents in part by political party. See, e.g., *Campaign Exposes Fissures over Issues, Values and How Life Has Changed in the U.S.*, PEW RES. CTR. (Mar. 31, 2016), <http://www.people-press.org/files/2016/03/3-31-16-March-Political-release->

As to the potential bias of NDAM1 members, we can speak of measurement bias and confirmation bias. Measurement bias entails “recall accuracy [that] may correlate with a voter’s political predisposition”<sup>158</sup> and confirmation bias “connotes the seeking or interpret[ation] of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.”<sup>159</sup> Although NDAM1 members are certainly subject to these biases, the nature of the study minimizes them.

First, the study did not ask respondents to compare the campaigns of the pro- and anti-personhood organizations. It asked, instead, that the respondent dissect his or her own campaign. Political bias in this context seems diminished because the distorting effects of political predisposition are muted when one is not asked to evaluate one’s own predisposition against that of another.

Second, the survey asked respondents to provide a number of reasons why the NDAM1 campaign was successful. This encouraged respondents to consider both the strong and weak reasons that NDAM1 was successful, and thus be critical of one’s own campaign.

Third, the survey ultimately detected clear response patterns. Wisdom of the crowd literature suggests that these patterns may indicate an objectively correct set of answers.<sup>160</sup>

Finally, the survey results were tested against other extant studies on political campaigns and compared positively. This suggested that the small sample size and potential biases did not negatively affect the study’s reliability.

I sent an email on December 12, 2015, to eighteen individuals who were the most active members of NDAM1 involved in the planning and execution of NDAM1’s political strategy.<sup>161</sup> In the email, I asked these individuals to list up to five reasons, ranked in order of importance, that they thought made the NDAM1 campaign so successful. I invited each individual to add additional comments, but noted that this was not necessary. I primed the individuals by informing them that I wanted

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1.pdf [<https://perma.cc/6XBX-25P4>] (providing an example of a survey in which respondents were broken up by political party).

158. Chung & Zhang, *supra* note 28, at 3 (citing Goldstein & Ridout, *supra* note 43).

159. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

160. See CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 25 (2006) (discussing the jury theorem, which states that large groups of people are better at picking the correct answer than a single person).

161. Phone bank volunteers, canvassers, and others who may have dedicated many hours to the campaign were not sent this email or otherwise asked to respond.

this information for scholarship on advancing reproductive rights.<sup>162</sup> I followed up with a reminder email on December 18, 2015.

Twelve individuals responded. Some provided five ranked, one-line answers, and others offered five ranked full paragraphs, each containing multiple reasons for NDAM1's success. One person offered only four reasons, another person offered five but eschewed the ranking, and another person offered five reasons plus additional "other observations." I first read though all of the responses, and I determined that there were ten overall categories of reasons given. These categories and the codes I have assigned to each are:

- Bipartisan (BP)
- Community oriented (CO)
- Spokespeople (SP)
- Bad law (BL)
- Messaging (MS)
- Planning (PL)
- Legislative/judicial environment (EN)
- Funding (FD)
- Organization (OR)
- "No" vote (NO)

I then coded each of the responses. For each of the ranked responses, I determined the primary reason and any other secondary reasons. If the response included only one reason, I coded that as the primary reason by bolding it. If the response included multiple reasons, I used my best judgment to determine the primary reason, and bolded it.<sup>163</sup> I coded the other, secondary reasons in plain type. This meant that every ranked response could include one or more reasons for NDAM1's success. For the one response that had "other observations," I coded that response and included it as part of the respondent's fifth most important reason(s).

For example, one respondent offered as the second most important reason for NDAM1's success the following: "Message consistency and not pandering to the opposition—also known as the opposition having very poor messaging & a poorly run campaign and us having a kick ass campaign. Having a Republican chairwoman, excellent third party validators—all the elements of a well-run campaign." It seemed to me that "Messaging" was this response's primary reason, and "Bipartisan"

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162. This Article represents my contribution to a collective of scholars, convened by Theda Skocpol, Director of the Scholars Strategy Network and Victor S. Thomas Professor of Government and Sociology, Harvard University, to discuss ways to advance reproductive rights.

163. To mute the effect of any bias or error that may have affected my judgment, I ranked each reason by giving equal weight to primary and secondary reasons. This is, furthermore, likely to produce an accurate reflection of respondents' opinions, since there was no indication that they considered multiple reasons in each response to be more or less important, relative to each other.

and “Spokespeople” were also given reasons. I therefore coded this response as follows: (2: **MS**, BP, SP), where “2” indicates that this response was ranked second in importance, “**MS**” indicates that messaging was the primary reason given, and “BP” and “SP” indicate that bipartisanship and spokespeople were the two secondary reasons given.

I then created an Excel spreadsheet with the ten coding categories in the first column and the codes in the second column. The next five columns were used to document how many times each reason was given, and whether it was given as the first, second, third, fourth, or fifth most important reason. Furthermore, I used the formulation  $\mathbf{X} + y = z$ , where  $\mathbf{X}$  represents the number of times a reason given was the primary reason,  $y$  represents the number of times a reason given was a secondary reason, and  $z$  represents the total of  $\mathbf{X}$  and  $y$ . I then added all of the responses for each coding category. Under “TOTAL,” I indicate the total number of times each coding category was given. Shown below is the spreadsheet, with substantive discussion of each coding category, culled from the responses, from most indicated to least, to follow, with the verbatim responses and their coding scheme footnoted for each category:

First	Second	Third	Fourth	Fifth	TOTAL
<i>Bipartisan (BP)</i>					
$2 + y = 2$	$\mathbf{X} + 2 = 2$	$1 + y = 1$	$1 + y = 1$	$1 + y = 1$	7
<i>Community Oriented (CO)</i>					
	$1 + y = 1$	$1 + y = 1$	$3 + y = 3$	$3 + y = 3$	8
<i>Spokespeople (SP)</i>					
$\mathbf{X} + 1 = 1$	$3 + 1 = 4$	$1 + 1 = 2$	$1 + y = 1$	$1 + 1 = 2$	10
<i>Bad Law (BL)</i>					
$2 + 1 = 3$	$3 + 1 = 4$	$3 + 1 = 4$	$\mathbf{X} + 1 = 1$	$1 + y = 1$	13
<i>Messaging (MS)</i>					
$3 + 1 = 4$	$3 + y = 3$	$4 + y = 4$	$3 + 1 = 4$	$2 + y = 2$	17
<i>Planning (PL)</i>					
$3 + y = 3$	$\mathbf{X} + 1 = 1$			$2 + y = 2$	6
<i>Legislative/Judicial Environment (EN)</i>					
$1 + 1 = 2$	$\mathbf{X} + 1 = 1$		$2 + y = 2$	$1 + y = 1$	6
<i>Funding (FD)</i>					
	$1 + y = 1$	$2 + y = 2$	$\mathbf{X} + 1 = 1$	$1 + y = 1$	5
<i>Organization (OR)</i>					
	$1 + y = 1$		$2 + y = 2$		3
<i>“No” vote (NO)</i>					
$1 + y = 1$					1

*A. Messaging*<sup>164</sup>

Seventeen responses indicated that messaging was important. Respondents most often referred to NDAM1's consistent and clear

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164. Here are the verbatim responses that indicated that “messaging” was an important reason for victory (in the footnotes to follow, I provide the verbatim responses for the other categories):

Well researched messaging that was delivered clearly and cohesively. The campaign did not simpl[y] react to the opposition and change message. It was consistent throughout the entire time period and throughout the staff and volunteer network. (1: **MS**)

The polls that were conducted by [a professional pollster] to determine the most effective message for ND voters. (1: **MS**)

One—I think the major reason it was successful was because we had a common sense message with “right” on our side. (1: **MS**, **BL**)

[A polling firm] provided essential focus on the right messages (IVF, end of life)—instead of those we might have wanted to be right (impact on contraception). (2: **MS**)

From the first training, our strategy was not to attack proponents religious beliefs and not to react to every talk show critic or mean spirited [letter to the editor]. Staying on message and being consistent with what we learned from the early focus groups was key. Of course we could not have gotten that message out there without the support and contributions of pro-choice organizations, churches and of course Planned Parenthood and a statewide effort coordinated by solid organizers like Amy and her team of brave and talented organizers. (2: **MS**, **PL**)

Message consistency and not pandering to the opposition—also known as the opposition having very poor messaging & a poorly run campaign and us having a kick ass campaign. Having a Republican chairwoman, excellent third party validators—all the elements of a well-run campaign. (2: **MS**, **BP**, **SP**)

Establishing and maintaining a cohesive message. The extreme nature of “personhood” conveyed through constant messaging of unintended consequences was chosen thoughtfully and not deviated from. End-of-life issues were powerful (senior citizens VOTE in large numbers), as was IVF (everybody has a friend, colleague, or relative who has had infertility issues). On both those issues, the idea of government intrusion into private, personal decisions resonated strongly. Enough money for TV ads that made the unintended consequences real through personal stories was critical. (3: **MS**, **BL**)

Third—effective use of media. (3: **MS**)

Consistent messaging. We worked hard to always have our answers, not reactive answers to the opposition. As a result, we controlled the conversation in public forums. We didn't allow any “buttons to be pushed.” We were always cool and controlled in those settings. Even when we were outnumbered in public forums, we almost always had control of the conversation. We didn't engage “crazy.” We refused to be provoked. Having “plants” with our questions at every public forum was also helpful. (3: **MS**)

message that did not react to opposition messaging. This meant in part that NDAM1's message remained positive and did not attack opponents. Respondents also indicated NDAM1's effective use of media (including effective letters to the editor and op-ed pieces in state newspapers, and use of social media, especially Facebook) and control of the conversation in public forums. Opponents were put into a defensive posture, from which they were never able to emerge. NDAM1's messaging was facilitated by use of focus groups and professional polling services (which revealed, in part, that messaging about abortion would not be effective in shifting voters' preferences).

*B. Bad Law*<sup>165</sup>

Thirteen responses indicated that NDAM1 won because Measure 1 was a bad law. Specifically, Measure 1 was viewed as having wide-

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The campaign instantly put the measure proponents into defense mode and they never were able to get out of that space. (3: **MS**)

Effective letter writing and op-ed pieces for newspapers across the state, see #4. (4: **MS**)

We stayed on message, they were all over the place. (4: **MS**)

Staying positive was sometimes difficult, especially where the proponents tried disruptive tactics to interfere in civil discussions, but, I think, essential to winning the trust of the voters. We were not shrill and the proponents were. (4: **MS**)

Taking advantage of a shifting message on the other side. What began openly as "personhood" morphed into "Human Life Amendment" and, later, M1 was pushed as a strengthener for "pro-life" laws already on the books and an "antidote to activist judges." Early on its religious overtones were played up by the proponents; later they were played down. We were able to advance the idea that proponents of M1 were trying to disguise their intent and fool voters. (5: **MS**)

Social media—especially Facebook—to spread the message. (5: **MS**)

165. We stressed the impact this measure would have on other aspects of women's health, particularly IVF and contraception. (1: **BL**)

The campaign presented doubt to the voters about the impact of the ballot language with legal analysis (IVF, end of life, etc.). (1: **BL**)

We pointed out that the vagaries of language made this measure open to other sorts of interpretation that were unintended. (2: **BL**)

Focus on end-of-life as an issue. (2: **BL**)

We brought in information that expanded the discussion beyond a polarizing abortion debate. We may have lost if we only had the legality of abortion as our primary point. (2: **BL**)

The IVF doctors warnings—esp Dr. Christensen saying that the IVF program would end if Measure 1 passed. I know that his letter was not sanctioned by Sanford—but it made an impact. (3: **BL**)

ranging potential effects on access to IVF, end-of-life care (living wills and health care proxies), and contraception. Measure 1 was also viewed as a vague law that would have unintended consequences. If the issue had been about abortion alone, NDAM1 might have lost; but Measure 1 was potentially about so much more, including governmental intervention in individuals' private lives.

*C. Spokespeople*<sup>166</sup>

Ten responses indicated that individuals who spoke against Measure 1 were effective. Social media served to bring people together,

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Focus on government's heavy-handedness in limiting individuals' choices. (3: **BL**)

From the ads, to house parties and other rallies, having people tell their personal stories that could be impacted by the ambiguous language of Measure 1, was key in raising awareness and persuading individuals that their end of life, fertility and denial of reproductive rights for whatever reasons were at stake. That so many people I encountered had a personal story that related to M1 was amazing! (3: **BL**, **SP**)

Having multiple strong messages—notably the interference with end of life care. The campaign did a great job of highlighting the unintended consequences of the measure. You can be opposed to abortion—but by god, you & your family will make decisions about grandma's healthcare—not the legislature! (5: **BL**)

166. Motivated persons with expertise were able to get in touch through [Planned Parenthood] and some progressive social networks almost immediately. In Grand Forks, this meant some clergy, Dr. Morrison, and myself. Some of this coincided with helping to campaign for progressive candidates who were running against standing legislators who had written the anti-abortion bills in that session. (2: **SP**, **EN**)

Understanding North Dakota voters and identifying friends within an array of important groups. Because Democrats (natural allies) accounted for (maybe!) 1 in 5 voters, we had to find "friends" in groups who might not be with us on all issues. The medical community was particularly important, and we were aided by the experience of defeating the Religious Liberty Amendment (June 2013? or was it 2012?), which particularly had brought us into contact with the IVF physicians. This time, we were able to make contacts more quickly. Getting North Dakota AMA on board was significant. We were fortunate the leadership there had changed and saw the measure as a threat to physicians. (Interfering in doctor/patient relationship is still a strong message for voters unless it is only tied to abortion.) Also, the Republicans who believe "getting government out of our lives" is important when it comes to birth control and abortion had been "sensitized" by the Religious Liberty Amendment and were quicker to oppose "personhood." Getting a Republican who had served in a Republican administration to head up the committee was valuable. Also, having on the committee someone who had worked with many Republican legislators also was important. Outreach was done to police and sheriffs in all larger communities and to some religious communities. We were pleasantly surprised by progressive pastors who wrote letters to the editor. (2: **SP**, **BL**, **BP**)

but clergy, medical professionals (including North Dakota's IVF doctors and the North Dakota branch of the American Medical Association), legal experts, IVF patients, and both Democrats and Republicans all appeared on radio talk shows, in op-ed pieces, and in advertisements. Many of these spokespeople also reached out to friends and opinion drivers, such as police chiefs and sheriffs. These spokespeople were, furthermore, highly credible. These spokespeople also benefitted from central coordination of efforts, facilitated by Planned Parenthood.

*D. Community Oriented*<sup>167</sup>

Eight responses indicated that NDAM1's community-oriented campaign was important. This meant that the campaign used culturally

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Collaboration with the faith community and strong support from the medical community about the uncertainty of the ballot language's impact. These faith leaders and physicians became great validators to the public that this wasn't a special interest issue. (2: **SP**)

We used sympathetic patients and religious leaders in our campaign ads. (3: **SP**)

Credibility of the anti-Measure 1 spokespeople. (4: **SP**)

The medical community spoke out against the measure, even though we were not supported by our employers in this. (5: **SP**)

167. Community focused. The campaign spoke to voters using culturally relevant spokespeople, events, ideas, and language. For example, there was no campaigning outside of the polls on election day because this is a social taboo in North Dakota and was until recently illegal. (2: **CO**)

Once doubt was entered into the voters minds, the strong opposition to the ballot language from Editorial Boards throughout the state in the final weeks helped support the voters doubt about the impact. (3: **CO**)

Ongoing and personal nature of grassroots work. Volunteer energy was significant, and it was aided by constant encouragement of volunteers to start conversations wherever they found themselves. An aggressive plan for "house party fundraisers" in the major cities was quite successful. Letters and op-eds were seen often in all major newspapers across the state. The themes of unintended consequences and government interference were always front and center. (4: **CO**, **MS**, **BL**)

Fourth—There was a successful on the ground effort that included aligning many different groups. (4: **CO**)

Focused efforts engaging specific interest groups, stakeholders and then mobilizing them (i.e. clergy). (4: **CO**)

Grassroots organization still in place from the Senatorial campaign, facilitating getting out the vote, etc. (5: **CO**)

Early community buy-in. Although most of the funds were raised out of state. The campaign created community buy in by early on asking individuals to host "house parties." These house parties raised funds but more importantly created "buy-in." Community members literally put their money where they mouth was when they donated at these events. Later on, these strong



relevant spokespeople, and disseminated its message in culturally appropriate ways. The campaign relied heavily on local volunteers. There was also community buy-in and outreach through the use of house parties. This facilitated outreach to many different groups. Ultimately, editorial boards of state newspapers tended to oppose Measure 1.

*E. Bipartisan*<sup>168</sup>

Seven responses indicated that NDAM1's bipartisan composition was important. The chair of the committee was a long-time and well-known North Dakota Republican. Visible and respected Republicans signed letters and reached out to their spheres of influence. Other Republicans who could not speak publically made donations. These trusted Republican validators facilitated conversation around a very conservative state as to the big-government aspects of Measure 1.

*F. Planning*<sup>169</sup>

Six responses indicated that NDAM1's planning was important. Planned Parenthood was able to coordinate an early and well-organized

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supporters were asked to also use their voice [by] writing letters to the editors, speaking with neighbors, volunteering, or hosting future events in support of the campaign. North Dakotans Against Measure One made contributors and volunteers feel essential to their success. (5: **CO**, **SP**)

Diligence in reaching out to various supportive groups. (5: **CO**)

168. The effort was bi-partisan. I realized from the first invitation to lead the effort that it was important to have a Republican as Chair of this effort to give permission to the majority of mainstream conservative Republicans, to vote to keep government intrusion out of their personal decisions. Visible, respected Republicans signed letters and reached out to their spheres of influence AND many other Republicans who could not speak out publically, made contributions and gave me confidence that the polls were wrong. (1: **BP**)

Bipartisan leadership and voices invited more voters to listen to the messaging. (1: **BP**)

Recruiting republicans and democrats for the committee. (3: **BP**)

Having Republican, grassroots leadership allowed the conversation to happen in coffee shops, dinner tables and social events from trusted Republican validators. (4: **BP**)

The partisan angle was greatly diminished in our work. (5: **BP**)

169. Planned Parenthood got organized in North Dakota almost immediately. There were 4 other anti-abortion pieces of legislation that were passed and signed by the governor during this time as well. I can't say enough about how well and how quickly [Planned Parenthood] got this off the ground. Public protests were launched in Grand Forks, Fargo, and Bismarck, which were successful right away at the beginning. (1: **PL**, **EN**)

Taking the time for process: Much thought was put into the process and timeline for opposing the measure. The strength of Planned Parenthood backing in this was critical. The focus groups run by [a professional pollster]

campaign. This gave NDAM1 the time to establish a strategy and gather stakeholders. It also allowed the campaign time to do polling and run focus groups. Among the most active members of the campaign, there was almost daily communication.

*G. Legislative/Judicial Environment*<sup>170</sup>

Six responses indicated that the legislative and judicial environment was ripe for a Measure 1 loss. This meant primarily two things. First, the 2013 state legislature had successfully passed a set of the country's most restrictive anti-abortion laws,<sup>171</sup> which were either constitutionally

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made clear that North Dakotans opposed abortion and also made clear messages that would NOT work in opposing the measure (for instance, issues about birth control were non-starters, as was anything to do with rights of women). The campaign was laid out step by step from there. A good deal of energy went into getting any factions opposed to the measure to work with the committee . . . really getting all the stakeholders to buy into the idea of central coordination. (1: **PL**, MS, SP)

The research-based approach to campaign (polling, focus groups, etc.). (1: **PL**)

Almost daily communication between our involved parties. (5: **PL**)

Fifth—We got people out to vote. (5: **PL**)

170. The 2013 Legislature—I think that people truly had abortion burnout. The Legislature passed TOO many bills and abortion dominated that session—people were tired of it—and that carried over to the campaign—the anger, frustration that folks felt still resonated so late after the session. (1: **EN**)

We actively promoted viable alternatives to the candidates who most promoted the measure and did aggressive fundraising and marketing for those candidates. (4: **EN**, FD)

The ND Supreme Court ruling on our medication abortion case in the last week or so before the election. Abortion rights took a major blow, healthcare took a step backward & I believe it had an impact on people thinking the right to abortion was threatened, and despite our best efforts to push back against bad legislation—we were defeated there. This ruling made things a bit more real for many. (4: **EN**)

I believe there was a broad disenchantment with that super-majority legislature which many voters resented for trampling not only on human rights but also landowner and conservation and higher education issues and frittering away their precious time on divisive social issues rather than the BIG infrastructure and growing criminal and environmental issues. The anti-super majority sentiment worked to defeat Sitte and Grande and slap Al Carlson “up-aside-the-head” by him coming in second in his district. (5: **EN**)

171. John Eligon & Erik Eckholm, *New Laws Ban Most Abortions in North Dakota*, N.Y. TIMES (Mar. 26, 2013), <https://www.nytimes.com/2013/03/27/us/north-dakota-governor-signs-strict-abortion-limits.html> [https://perma.cc/ETN6-2CJL].

suspect<sup>172</sup> or actually struck down by courts.<sup>173</sup> There may have been voter burnout as to the abortion issue that carried into the next year's Measure 1 campaign. Some may have felt that the legislature also mistreated issues involving landowners, conservation efforts, and higher education. They may have also felt that legislators ignored more pressing matters by paying too much attention to divisive social issues. As evidence of this, while voters defeated Measure 1, they also voted out of office two fierce supporters of Measure 1 and anti-abortion laws.<sup>174</sup> Second, on the eve of the Measure 1 vote, the North Dakota Supreme Court upheld a ban on a safe medication abortion procedure,<sup>175</sup> which forced women to undergo more risky procedures. Some people may have therefore believed that health care and abortion rights were under attack, which made the stakes of Measure 1 more real for some people.

#### *H. Funding*<sup>176</sup>

Five responses indicated that funding was important. This allowed NDAM1 to take advantage of expensive marketing such as television

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172. *Id.*

173. Associated Press, *Court Strikes Down Strict North Dakota Abortion Law*, N.Y. POST (July 22, 2015), <https://nypost.com/2015/07/22/court-strikes-down-strict-north-dakota-abortion-law/> [<https://perma.cc/66T8-U48B>].

174. Ryan Johnson, *ND Voters Reject 'Right to Life' Measure 1*, INFORUM (Nov. 5, 2014, 1:34 AM), <http://www.inforum.com/content/nd-voters-reject-right-life-measure-1> [<https://perma.cc/H6D3-8J9C>].

175. *MKB Mgmt. Corp. v. Burdick*, 855 N.W.2d 31, 32 (N.D. 2014) (per curiam). The continued validity of this opinion was called into question in 2016, when the FDA approved mifepristone as an abortion-inducing medication. *Mifeprex (mifepristone) Information*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm111323.htm> [<https://perma.cc/9JMG-KL5Z>] (last updated Mar. 30, 2016).

176. Two—We also were incredibly well financed. (2: **FD**)

Well funded. The North Dakotans Against Measure 1 campaign was well funded which allowed them to take advantage of more expensive types of marketing such as TV advertisements. These fund[s] were also used effectively. Money was spent on high return strategies such as TV advertisements and not on low return strategies such as yard signs. (3: **FD**)

[Planned Parenthood]—\$1.5 million funding for the messaging. (3: **FD**)

A few other observations. The money we raised in the state was not nearly enough. We relied heavily on Planned Parenthood to fundraise outside the state. The TV ads were professionally done and engaging—both thought provoking and emotional. The best success of the campaign was convincing North Dakotans something that would affect them personally in a negative way was bound to happen if M1 was passed. (5: **FD**)

spots. Furthermore, NDAM1 did not spend money on low-return strategies, such as yard signs.

*I. Organization*<sup>177</sup>

Three responses indicated that organization was important. National groups such as the ACLU, American Congress of OB-GYNs, and American Society for Reproductive Medicine lent support, and Planned Parenthood facilitated in-state organization. Finally, the NDAM1 committee was important for organization.

*J. "No" Vote*<sup>178</sup>

One response indicated that NDAM1's advocacy of a "no" vote was important. It was thought that it is easier to advocate for the status quo by a "no" vote than convince voters to change the law. This respondent claimed that North Dakotans are "notoriously afraid of change," and may tend to vote "no" to preserve the status quo.

IV. EMPIRICAL SUPPORT

Given the small sample size and potential bias inherent in this survey, it is important to test NDAM1 respondents' claims against extant empirical studies regarding successful political campaigns. As it turns out, there is substantial empirical support for the validity of NDAM1 members' opinions. Testing the survey results above against extant studies should also provide richer general insight into what works in personhood amendment campaigns.

*A. Messaging*

Extant empirical studies on messaging suggest three relevant points.

First, successful political campaigns prime voters with a "valence" issue.<sup>179</sup> This is something that is salient, easily understood, and conveyed to others.

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177. Forming the NDAM1 committee. (2: **OR**)

Planned Parenthood. I credit the resources of Planned Parenthood (VAN, Funding, Network) and their extensive experience in campaigns just like this one with this strong victory. (4: **OR**)

Working with national organizations, especially Planned Parenthood, ACLU, ACOG, ASRM. (4: **OR**)

178. We advocated for a NO vote. It is easier to get voters to keep things as is by voting no as opposed to changing the status quo with a yes vote. North Dakotans are notoriously afraid of change. (1: **NO**)

179. See Henry E. Brady, Richard Johnston & John Sides, *The Study of Political Campaigns*, in CAPTURING CAMPAIGN EFFECTS 1, 8-9 (Henry E. Brady & Richard Johnston eds., 4th ed., 2009) <http://home.gwu.edu/~jsides/study.pdf> [<https://perma.cc/4ZV4-NDYC>] (explaining that Harry

Second, informational messaging, which involves the dissemination of information, is contrasted to two other types of messaging: substantive messaging, which announces a campaign's policy position in order to capture certain voting blocs, and competitive messaging, which serves to spin one's campaign in comparison to the opposition.<sup>180</sup> While most campaigns use a mixed messaging strategy,<sup>181</sup> frontrunners disproportionately concentrate on informational messaging, second-tier candidates adopt competitive messaging, and third-tier candidates use substantive messaging.<sup>182</sup>

Third, negative campaigning may be detrimental to the individual or group that engages in it. According to one study, there are two types of competitive messaging. "Positive competitive" messaging functions to define the "horse race" or tout prestigious endorsements.<sup>183</sup> "Negative competitive" messaging entails attacking the opponent.<sup>184</sup> Commentators have observed that since the 1990s, citizens have become skeptical of political life and have withdrawn from it while maintaining "widespread civic and community participation."<sup>185</sup> "Citizens want to solve problems politely but find political organizing marked by conflict."<sup>186</sup> Negative campaigning, therefore, may not harm its target<sup>187</sup> and may, in fact, backfire to harm the message disseminator.<sup>188</sup>

NDAM1 may have successfully engaged all three of these points.

First, NDAM1 primed voters with the valence issue that Measure 1 posed a threat of big government invading individuals' private health care and end-of-life decision-making. Supporters attempted to prime voters with the issue that Measure 1 would protect all life.

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Truman's 1948 campaign successfully used priming, whereas Al Gore's 2000 campaign lost the election in part due to his failure to prime voters on a valence issue, namely the positive assessment of the national economy).

180. Audrey A. Haynes, Julianne F. Flowers & Paul-Henri Gurian, *Getting the Message Out: Candidate Communication Strategy During the Invisible Primary*, 55 POL. RES. Q. 633, 634-35 (2002).

181. *Id.* at 648.

182. *Id.* at 639.

183. *Id.* at 646.

184. *Id.*

185. Elizabeth A. Bennett et al., *Disavowing Politics: Civic Engagement in an Era of Political Skepticism*, 199 AM. J. SOC. 518, 521 (2013).

186. *Id.* at 536.

187. Richard R. Lau, Lee Sigelman & Ivy Brown Rovner, *The Effects of Negative Political Campaigns: A Meta-Analytic Assessment*, 69 J. POL. 1176, 1185 (2007).

188. Kim L. Fridkin & Patrick J. Kenney, *Variability in Citizens' Reactions to Different Types of Negative Campaigns*, 55 AM. J. POL. SCI. 307, 322 (2011).

Second, NDAM1 engaged in advantageous informational messaging. To be sure, it was only on election night that it was clear that voters were going to reject Measure 1. NDAM1 was never the clear frontrunner. Given its informational messaging campaign (providing the public, for example, with a legal analysis of Measure 1 and informing the public that IVF doctors would have to stop working if Measure 1 passed), however, NDAM1 positioned itself as the frontrunner and signaled that to voters. Measure 1 supporters, in contrast, often engaged in competitive messaging by disparaging NDAM1 members or attempting to show the public why NDAM1 was wrong. Supporters, therefore, positioned themselves in the second tier. Furthermore, when supporters declared that they were voting for Measure 1 because they were pro-life, they even on occasion positioned themselves as *third-tier* by adopting a substantive message.

Third, by using competitive messaging, supporters adopted the “philosophy of campaign as war”<sup>189</sup> to their detriment in two ways. Whether they used positive or negative competitive messaging, Measure 1 supporters risked appearing as though they were waging a *political* campaign, as contrasted to a *problem-solving* campaign. NDAM1, in contrast, generally maintained a proactive, consistent message that attacked the merits of Measure 1, not its supporters. These supporters also engaged in negative competitive campaigning, possibly to their detriment. The most self-harmful negative messages are those that are both uncivil and irrelevant. And Measure 1 supporters engaged in such messaging.<sup>190</sup>

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189. Julianne F. Flowers, Audrey A. Haynes & Michael H. Crespino, *The Media, the Campaign, and the Message*, 47 AM. J. POL. SCI. 259, 260 (2003).

190. In one op-ed, a lawyer for the supporters claimed that I (one of NDAM1’s legal advisors) was engaging in “scare tactics” regarding Measure 1’s potential to limit end-of-life health care possibilities, and that readers should trust him in part because he has cancer and he would not support Measure 1 if he had any doubt that it would affect his right to control his decision-making. Ronald Fischer, *Measure Won’t Affect End-of-Life Choice*, BISMARCK TRIB. (Aug. 25, 2014), [https://bismarcktribune.com/news/columnists/measure-won-t-affect-end-of-life-choice/article\\_13fd38ac-2bad-11e4-a9bd-001a4bcf887a.html](https://bismarcktribune.com/news/columnists/measure-won-t-affect-end-of-life-choice/article_13fd38ac-2bad-11e4-a9bd-001a4bcf887a.html) [<https://perma.cc/QN7N-L5GW>]. Similarly, the chair of North Dakota Choose Life drafted an op-ed claiming that I am an “ultra-liberal east-coast educated lawyer whose work includes a stint with the ACLU, defending terrorists, and advising radical secularists.” Janne Myrdal, *UND Professors Views on Measure 1 “Insulting and Preposterous,”* SAYANYTHINGBLOG.COM (Sept. 12, 2014), <https://sayanythingblog.com/entry/janne-myrdal-und-professors-views-measure-1-insulting-preposterous/> [<https://perma.cc/32VF-LRYG>]. Supporters also criticized NDAM1 for “politicizing” a woman’s story, mentioned above, involving the difficult decision she had to make when she realized that twins she was carrying would not survive to birth. Christopher Dodson, *Heitkamp’s Attack on Measure 1 Makes No Sense*, SAYANYTHINGBLOG.COM (Nov. 2, 2014), <https://sayanythingblog.com/entry/chris-dodson-heitkamps-attack-measure-1-makes->

*B. Bad Law*

Voters can be influenced by an environment that is both informational and motivational.<sup>191</sup> Moreover, motivation can cause voters to “evaluate policies thoughtfully and seriously.”<sup>192</sup> Voter awareness of an issue is also clearly important,<sup>193</sup> and this awareness only grows when the issues concern “morality, civil liberties, and civil rights.”<sup>194</sup> Finally, “when voters find an initiative is too complicated, incomprehensible, or vague, the model response is caution; the status quo position for a large majority of voters is the no vote.”<sup>195</sup>

Informational messaging, therefore, can only be as effective as the quality of the information. NDAM1 had an advantage because Measure 1 appeared to entail many more negative ramifications (which NDAM1 advertised) than positive ramifications (i.e. protecting life, which supporters of Measure 1 advertised). Measure 1 could, therefore, be viewed as “bad law.”

Voters were clearly made aware of and were convinced by NDAM1’s account of Measure 1’s negative ramifications. The media reported on Measure 1 as well, which increased voters’ awareness of the issue.<sup>196</sup> Measure 1, furthermore, occupied a space very near the confluence of morality, civil liberties, and civil rights. Finally, for voters who remained unsure what to think about Measure 1, NDAM1’s message that Measure 1 was vague and entailed unintended consequences may have resonated and caused people to vote “no.”

*C. Community-Oriented Spokespeople*

To determine and shift their preferences, voters benefit from contact with opinion leaders within their social groups.<sup>197</sup> While television

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sense/ [<https://perma.cc/NP4N-Y8ZC>]. Finally, supporters claimed that “money shows Measure 1 opponents are lying.” James Kerian, *Money Shows Measure 1 Opponents are Lying*, SAYANYTHINGBLOG.COM (Oct. 7, 2014), <https://sayanythingblog.com/entry/north-dakota-measure-1-7/> [<https://perma.cc/2BHL-GA73>].

191. James H. Kuklinski et al., *The Political Environment and Citizen Competence*, 45 AM. J. POL. SCI. 410, 411 (2001).

192. *Id.* at 413.

193. Stephen P. Nicholson, *The Political Environment and Ballot Proposition Awareness*, 47 AM. J. POL. SCI. 403, 403 (2003).

194. *Id.* at 407.

195. Joshua J. Dyck, *Political Distrust and Conservative Voting in Ballot Measure Elections*, 63 POL. RES. Q. 612, 613 (2010).

196. See Nicholson, *supra* note 193, at 407 (“Citizen awareness of a ballot proposition may grow with increasing news media coverage since heavy news coverage of an issue helps shape the public’s agenda.”).

197. Brox & Shaw, *supra* note 29, at 147.

and mass-media communication may be valuable, face-to-face interpersonal communication remains a vital aspect of this contact.<sup>198</sup> This contact, in fact, may help a voter to support a position she otherwise would not.<sup>199</sup> In addition, simply interacting with one's community—in the workplace and home, and where we socialize and worship—plays a crucial role in determining what decisions people make.<sup>200</sup>

The modest conclusion that can be drawn from this is that small, communicative communities facilitate conversation and enhance viewpoint fluidity. While North Dakota is a small state, with relatively tight-knit communities—which may provide a baseline communicative benefit—NDAM1 proactively created and engaged this environment through the use of house parties, tabling, public forums, and volunteer recruitment. In addition, NDAM1's heterogeneous spokespeople were all local, and included doctors, legal experts, medical-ethics experts, religious leaders, and people personally affected by the law that Measure 1 implicated.

In contrast, Measure 1 supporters' spokespeople tended to come from or be tied to a particularly conservative brand of Christianity. To illustrate what might have been a paucity of effective spokespeople, supporters touted a visit to North Dakota of former Attorney General John Ashcroft to speak in favor of Measure 1.<sup>201</sup> His message was ineffective.

#### *D. Bipartisan*

A bipartisan approach to campaigning can be treated as an electoral strategy used to broaden the campaign's appeal to voters who, because of partisan preferences, would not normally be amenable to the campaign's message.<sup>202</sup> Furthermore, in ballot initiative campaigns, where initiatives may not display an explicit partisan bent, voters might look to the information environment to get their partisan cues.<sup>203</sup> Thus,

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198. Jared Barton, Marco Castillo & Ragan Petrie, *What Persuades Voters? A Field Experiment on Political Campaigning*, 124 ECON. J. 294, 294 (2013); Brox & Shaw, *supra* note 29, at 148, 151.

199. Brox & Shaw, *supra* note 29, at 152.

200. Mary R. Anderson, *Beyond Membership: A Sense of Community and Political Behavior*, 31 POL. BEHAV. 603, 605–06 (2009).

201. Ryan Johnson, *Ashcroft: No 'Parade of Horrors:' Former U.S. Attorney General Talks on Measure 1*, THE DICKINSON PRESS (Oct. 23, 2014, 11:25 PM), <http://www.thedickinsonpress.com/content/ashcroft-no-parade-horrors-former-us-attorney-general-talks-measure-1> [<https://perma.cc/AH5M-TESN>].

202. Peter Trubowitz & Nicole Mellow, *"Going Bipartisan": Politics by Other Means*, 120 POL. SCI. Q. 433, 433 (2005).

203. Dyck, *supra* note 195, at 613.



even on ballot initiatives, “partisan voting . . . is the rule, not the exception.”<sup>204</sup>

It makes sense, then, that if political campaigns are effective in shifting some voters’ preferences, then bipartisan campaigns will be more effective because they send the message to some default partisan voters that it is permissible to shift their preferences. NDAM1’s campaign was bipartisan: its chair was a long-time and well-known Republican, the North Dakota Libertarian Party opposed the measure, and, given the election results, a substantial number of North Dakota conservatives voted against Measure 1.

In contrast, Measure 1 supporters were uniformly highly socially conservative, and most were probably conservative Christians as well. While their base supported Measure 1, it appears that their message did not persuade others.

#### *E. Legislative/Judicial Environment*

The political environment can serve as an “informational crutch,” which helps voters to decide how to vote.<sup>205</sup> It can provide information to voters as well as motivate them to come out on election day.<sup>206</sup>

A number of NDAM1 members suggested that the legislative and judicial environment leading up to the vote helped persuade voters to oppose Measure 1. This environment included a raft of recently-passed anti-abortion laws, a North Dakota Supreme Court opinion affirming one of those laws, and a conservative legislature that supported these moves and ignored other more pressing, less socially incendiary, issues.

In addition to NDAM1 providing the information and motivation to oppose Measure 1, the legislative and judicial moves noted above may have signaled to voters that social conservatives in the legislative assembly had arrogated too much power and influence, and that a shift back to the center was in order. Voters may have also resented these legislators’ attention to incendiary social issues when the state, facing an incredible budget surplus and unprecedented needs as the result of a sudden and massive oil boom in the western part of the state, should be paying attention to more grounded issues like infrastructure, taxation, law enforcement, and education. Given the available data, it is impossible to tell whether or to what extent the environment shifted voters’ preferences. It seems likely, however, that it did have some effect.

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204. *Id.*

205. Kuklinski et al., *supra* note 191, at 410.

206. *Id.* at 411.

### *F. Funding*

One study has found that the two first-order determinants of a campaign victory are (1) running a campaign “in friendly terrain,” and (2) “being able to outspend an opponent.”<sup>207</sup> The sources of the funding, in turn, entail second-order effects. Self-financing is correlated with less campaign success, whereas PAC donations are correlated with greater success, as are in-state donations, and no less so than PAC donations.<sup>208</sup>

If Measure 1 was a “conservative” measure, then NDAM1 was not operating in friendly terrain. It did, however, have a spending advantage, having raised \$824,487 to supporters’ \$585,632. NDAM1 ultimately spent \$589,275 to supporters’ \$416,027.<sup>209</sup>

Of the \$824,487 that NDAM1 raised, \$698,275 came from Planned Parenthood of Minnesota, North Dakota, and South Dakota.<sup>210</sup> An additional \$57,875 came from other Planned Parenthood affiliates around the country.<sup>211</sup> NDAM1 did, however, work hard to obtain a large number of individual donations from in-state individuals. There was some concern that North Dakota voters would be turned off by this out-of-state money (from a presumptively unpopular special interest). Indeed, Measure 1 supporters attempted to use it to sway voters.<sup>212</sup>

To the extent that Planned Parenthood money is perceived and has the same effect as PAC money, NDAM1’s concerns and Measure 1 supporters’ use of the donation as a campaign issue both seem at least somewhat misplaced. While it is inconceivable that conservative North Dakotans voted against Measure 1 *because of* Planned Parenthood funding, it is clear that the funding allowed NDAM1 to win the overall funding race, which is, as noted above, a first-order determinant of success. The source of the money was not as effective in swaying voters.

## V. LIMITATIONS AND APPLICATIONS

The campaign against Measure 1 holds lessons for other campaigns to advance the right to abortion and related reproductive rights. It engaged a broad coalition of supporters, including faith leaders. It had a clear, consistent message, and it never deviated from that message.

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207. Brad Alexander, *Good Money and Bad Money: Do Funding Sources Affect Electoral Outcomes?*, 58 POL. RES. Q. 353, 355–56 (2005).

208. *Id.*

209. North Dakota “Life Begins at Conception” Amendment, Measure 1 (2014), BALLOTPEDIA, [https://ballotpedia.org/North\\_Dakota\\_%22Life\\_Begins\\_at\\_Conception%22\\_Amendment,\\_Measure\\_1\\_\(2014\)](https://ballotpedia.org/North_Dakota_%22Life_Begins_at_Conception%22_Amendment,_Measure_1_(2014)) [https://perma.cc/EP35-N7ZQ] (last visited Oct. 5, 2016).

210. *Id.*

211. *Id.*

212. Kerian, *supra* note 190.

Its campaign was truly grassroots, using volunteers to host local house parties, phone bank, table, and write letters to the editor. The campaign was based on polling and focus group testing, and was scheduled, long-term, and well-considered.

To illustrate the replicability of NDAM1's success, consider an analysis of the 1996 Colorado ballot initiative on that state's "Parental Rights Amendment,"<sup>213</sup> an amendment that, at first blush, seemed to be a common-sense way to protect the integrity of families against governmental intrusions. Although this initiative had nothing to do with reproductive rights, the campaign against it and ultimate electoral result were strikingly similar to that of Measure 1.

First, the vote against the Parental Rights Amendment was 57% to 43%—a near landslide—where just two months prior to voting day, 76% of voters supported the measure.<sup>214</sup> This major shift in voter preferences reflects the shift regarding Measure 1.

Second, amendment supporters failed to mount a serious campaign. One opponent claimed that supporters thought that their "deep pockets and the public's perception that parents have rights were all it would take."<sup>215</sup> It may be that Measure 1 supporters believed that they too had a lock on victory in North Dakota, a conservative and pro-life state.

Third, opponents mounted a serious, well-thought-out campaign composed of many groups, including the ACLU, Planned Parenthood, League of Women Voters, Adoption Exchange, and others.<sup>216</sup> It is possible that NDAM1's similarly broad and heterogeneous support helped it prevail.

Fourth, opponents' message was based on polling to determine the most resonant issues, and was reduced to four specific messages that the campaign focused on.<sup>217</sup> These points implied the amendment's vagueness and its unintended consequences, which included protecting abusive and neglectful parents and turning schools into "ideological battlegrounds."<sup>218</sup> One opponent stated, "[o]ne of the greatest factors [in the amendment's defeat] was conducting detailed polling and then using the information to develop persuasive messages."<sup>219</sup> Similarly, NDAM1 members cited the polling and focus group testing as instrumental in crafting a directed, effective message.

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213. Patricia Donovan, *The Colorado Parental Rights Amendment: How and Why It Failed*, 29 FAM. PLAN. PERSP. 187 (1997).

214. *Id.*

215. *Id.*

216. *Id.* at 188.

217. *Id.*

218. *Id.*

219. *Id.* at 190.

Fifth, supporters of the amendment “were never able to communicate their message of ‘no governmental interference’ in a way that galvanized people to support the amendment,” and could not counter the argument that the amendment could enable child abuse.<sup>220</sup> Similarly, Measure 1 supporters were never able to convince voters that Measure 1 would not present any threat to end-of-life care or IVF. And it was exceedingly difficult to convince voters of the latter, since all of North Dakota’s IVF doctors informed the public that they would be forced to stop work in North Dakota if Measure 1 passed.

Sixth, supporters used a “talking head,” a former U.S. attorney for Colorado, who argued that the amendment would not impede abuse cases.<sup>221</sup> Measure 1 supporters, in turn, had the dubious benefit of former U.S. Attorney General John Ashcroft.

Seventh, opponents had a “clear message” and “organized local communities to be [their] messengers.”<sup>222</sup> The campaign, furthermore, was proactive and not reactive.<sup>223</sup>

To be sure, the Measure 1 campaign entailed a number of confounding variables that may limit its replicability.

First, NDAM1 was able to argue convincingly that Measure 1 could have negative ramifications for end-of-life care and IVF, which helped to carry voters away from supporters’ anti-abortion message. End-of-life care and IVF were compelling issues on which the vast majority of voters could agree. Amendments that target only the abortion right will not have this powerful argument.

Second, North Dakota is a conservative and religious state, but it also has a libertarian and modest streak that may inhibit passage of some socially incendiary and religiously-motivated laws. Other states that are more traditionally conservative, meaning that their electorate is comfortable with passing anti-libertarian morals legislation, may be more amenable to personhood amendments.<sup>224</sup>

Third, NDAM1 merely had to convince voters to vote “no” on Measure 1. Some conservative voters who resist precipitous or fundamental change and voters who were unconvinced by Measure 1 supporters’ argument would vote “no” as their default. Piecemeal legislation, as opposed to a sweeping constitutional amendment, may be more palatable to conservative voters.

Fourth, a number of highly salient issues were presented as ballot initiatives in addition to Measure 1. This meant that a large portion of

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220. *Id.* at 188.

221. *Id.* at 189.

222. *Id.*

223. *Id.* at 190.

224. This did not, of course, enable passage in Mississippi and Colorado.

voters had at least one issue about which they were passionate.<sup>225</sup> They turned out to vote for or (more likely) against their particular issue, and once in the voting booth, voted “no” on the other issues, including Measure 1, about which they might have been less educated.

Fifth, Measure 1 supporters made some key errors: they changed the substance of their message throughout the campaign, they engaged in uncivil and irrelevant negative campaigning, and they reacted to NDAMI’s campaign rather than proactively advancing their own agenda.

## CONCLUSION

In the wake of *Whole Woman’s Health* and a series of failures to enact personhood amendments, the pro-life movement seems to be on its heels. Despite voters’ skepticism as to these amendments, *Whole Woman’s Health* suggests that they will become more attractive as a pro-life strategy. At the same time, the movement around these amendments has been understudied.

This Article has sought to remedy that by analyzing the broadly applicable 2014 personhood amendment campaign in North Dakota through historical, legal, and political frameworks. While the future of reproductive rights remains unwritten and unpredictable (*Whole Woman’s Health*, for example, was supposed to be a central feature of a highly conservative Supreme Court term until Justice Scalia’s death),<sup>226</sup> and personhood amendments seemed destined to fail, nothing is certain.

Pro-life advocates will likely turn resources away from higher-cost TRAP laws and toward constitutional personhood amendments. The lessons drawn from the North Dakota example will apply to these future fights. Opponents of such amendments will be heartened, and will try to find a roadmap to future victories. Proponents, facing a steep uphill battle, will find a sober analysis of the challenges they face and the questions they must answer. Scholars of the reproductive rights movement will find a detailed snapshot of a movement that began with

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225. 46.81% of the voting age population turned out, *Official Results General Election November 4, 2014*, NDVOICES, <http://results.sos.nd.gov/results/VoterTurnout.aspx> [<https://perma.cc/A8RB-HWL8>] (last visited Oct. 6, 2016), compared to a national average that year of 36.3%, one of the lowest turnouts in recording United States history (North Dakota ranked twelfth in turnout out of all fifty states plus Washington D.C.). The Editorial Board, *The Worst Voter Turnout in 72 Years*, N.Y. TIMES (Nov. 11, 2014), <https://www.nytimes.com/2014/11/12/opinion/the-worst-voter-turnout-in-72-years.html> [<https://perma.cc/8K46-37XV>].

226. Robert Barnes, *For Conservatives, High Court’s Term Was a Letdown*, WASH. POST (June 28, 2016), [https://www.washingtonpost.com/politics/courts\\_law/for-conservatives-a-letdown-at-the-high-court/2016/06/28/7bab07e6-3d4d-11e6-84e8-1580c7db5275\\_story.html](https://www.washingtonpost.com/politics/courts_law/for-conservatives-a-letdown-at-the-high-court/2016/06/28/7bab07e6-3d4d-11e6-84e8-1580c7db5275_story.html) [<https://perma.cc/DN79-D7N5>].

*Roe v. Wade*, may have been fundamentally altered by *Whole Woman's Health*, and will continue well into the future.